No. 6482

In the

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY, a corporation
Appellant

vs.

W. G. SHELLENBARGER
Appellee

Appellee's Brief

Upon Appeal from the United States District Court for the District of Oregon

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STATEMENT OF THE CASE

This action was commenced in the Circuit Court of Multnomah County, Oregon, and was removed by appellant to the United States District Court for the District of Oregon. It was brought to recover damages resulting from personal injuries sustained by appellee, at or near the town of Saco, in the State of Montana, while he was riding as a passenger on a special, non-schedule vestibuled passenger train, consisting of ten cars and an engine, and being controlled and operated by appellant.

The Spokane, Portland and Seattle Railway Company was made a party defendant along with appellant because appellee did not know, at the time the action was filed, which one of the two companies was in control of and operating the train. It appearing from the answer filed by appellant (Record, p. 10) that it admitted that appellant was in control of and operating the train at the time and place of appellee's injury, appellee took a voluntary non-suit as to said Spokane, Portland and Seattle Railway Company and the action proceeded against appellant, alone.

Appellee boarded the train at Portland, Oregon, on the morning of July 12, 1928, and his destination, as was that of the other passengers, was Detroit, Michigan. The very last car of the train or the one the farthest to the rear of the engine was an observation car and appellee's berth was a few coaches forward from said observation car. At about the hour of 10:30 o'clock on the night of July 13, 1928, appellee, who had been riding in said observation car, was in the act of walking therefrom to the coach next ahead, it being his intention to go to his berth and retire for the night, and while appellee was walking along the passage way in the vestibule between said two cars there was, as appellee contends, a sudden and unusual and extraordinarily violent lurch of the train, which caused appellee to lose his balance and to be thrown with great force through an open vestibule door and out on to the right-of-way.

The vestibule door in question was located on the lefthand side, as the train was proceeding, of the rear platform of the said coach, which appellee was desirous of entering, and in appellee's complaint it was alleged, among other things, that appellant negligently operated said train, thereby causing it to give said violent and unusual lurch and that appellant was further negligent in allowing said vestibule door and the steps or "trap" on the lefthand side of the rear platform of said coach to be open and exposed between stations and at a time when the train was not discharging or receiving passengers and was in rapid motion.

Appellant denied the negligence charged except that it admitted that said vestibule door was open and in its answer and by its testimony appellant sought to excuse said open vestibule door by contending that it was necessarily open to enable its rear brakeman or flagman to perform certain operating duties at that place in the train.

This contention was denied by appellee's reply and testimony was elicited from said rear brakeman and was given by other of appellant's witnesses and was offered and received in behalf of appellee, conclusively showing that said vestibule door and steps or "trap" need not, for any operating necessity, have been open at said time and place in the train and that the having of the same open was in direct violation of a standard operating rule of appellant.

It was also affirmatively alleged in appellant's answer that appellee was guilty of contributory negligence in that while said rear brakeman was standing at said open vestibule door appellee carelessly "proceeded" from the vestibule. This was denied by appellee's reply and constituted one of the issues of fact submitted to the jury.

The action was tried before the Honorable Robert S. Bean and, as stated by him in his instructions to the jury (Record, p. 336) the questions in the case were largely questions of fact for the jury's determination. Only two persons were on the rear platform of the said coach at the time appellee was injured, namely, said rear brakeman and appellee and, as to what transpired, the testimony revolved largely around their diametrically opposed versions. Appellee testified, and contends that the weight of the evidence preponderated to show, that he was thrown through said vestibule with such force and violence as to knock said rear brakeman to one side and plunge or hurl appellee "through space" and out on to the right of way. Said rear brakeman contended, on the other hand, and appellant sought to show, that appellee walked or stepped from the train.

At the conclusion of the evidence appellant interposed a motion for a directed verdict in its favor on the grounds and as shown at pages 328, 329 and 342 of the Record. Said motion was denied and the cause submitted to the jury, resulting in a verdict in favor

of appellee and from the judgment duly entered on said verdict appellant prosecutes this appeal. As will be shown in our argument, there is but one legal question presented for the decision of this Court and that is, whether the trial Court erred in denying appellant's motion for a directed verdict.

ARGUMENT

We desire at the outset to direct the Court's attention to the fact that, under the rules and decisions of this Court, the Record and appellant's brief present but one question for the determination of this Court, namely, whether the trial Court erred in denying appellant's motion to direct a verdict in its favor on the alleged ground that there was no proof of negligence *on the part of appellant*, sufficient to warrant the submission of the case to the jury.

Rule 24 of this Court provides, among other things, that appellant's brief shall contain a specification of the errors relied upon and intended to be urged and that errors not so specified will be disregarded, and it was held by this Court in *Wabash Ry. Co. v. Lindley, 29 Fed. (2d) 829*, at page 831, that assignments of error will be considered abandoned when not in the specifications of errors. Rule 10 of this Court provides, among other things, that exceptions to the instructions of the Court to the jury must be taken while the jury is yet at the bar and before the jury has retired to deliberate

on the case. Bearing in mind these considerations, it will be seen that the single question presented for review is as heretofore stated.

Assignment of Errors numbered 1 (Record, p. 342), constituting Specification of Error 6 (appellant's brief, p. 7), relates to the contention urged in appellant's motion for a new trial that the damages awarded by the jury are excessive and appear to have been given under the influence of passion and prejudice. Said Specification of Error 6 is expressly waived and abandoned by appellant in the following statement shown at page 51 of its brief: "For this reason we shall not urge here the specification of error based upon the excessive award made by the jury."

Assignment of Errors numbered 2 (Record, p. 342), constituting Specification of Error 1 (appellant's brief, p. 6) relates to said motion for a directed verdict, and will presently be considered at length. It should be noted, however, at this point, that appellant has waived and abandoned its former contention that said motion for a directed verdict should be granted because of the alleged contributory negligence of appellee. As shown at page 342 of the Record, one of the grounds assigned in said motion for a directed verdict was "that the evidence showed that the plaintiff was guilty of contributory negligence and that such negligence was a proximate cause of the accident." In said Specification of Error 1, shown at page 6 of appellant's brief, said ground for the direction of a verdict is deleted, and

there appears, in place of the ground just quoted from said Assignment of Errors 2, three stars. There is, therefore, no specification of error to the effect that appellee was, as a matter of law, guilty of contributory negligence, showing that no such contention is intended to be urged.

It is, perhaps, worthy of notice, in passing, that the trial Court, in submitting the alleged contributory negligence of appellee to the jury as a question of fact, carefully protected every legal right to which appellant can possibly claim to have been entitled. In its instructions to the jury the trial Court, after referring to the allegations of appellant's answer to the effect that appellee was guilty of contributory negligence in that he carelessly proceeded from the vestibule, said:

> "In other words, the defendant alleges that this injury that the plaintiff received was due to his own carelessness and negligence, or, in other words, was due to want of due care on his part. And in orderly consideration of this case, it seems to me that this is probably the first question for this jury to determine, because if this injury was due to the carelessness and negligence of Mr. Shellenbarger then he is not entitled to recover, regardless of whether the railway company was negligent or not, and so in an orderly consideration, I would suggest that you consider that question first." (Record, pp. 331-332.)

The trial Court, after stating that appellee had the lawful right to pass from one car to another, further said:

> "But in doing that he was required, as any

> passenger on a railway train is, to exercise due care for his own safety, and to look where he was going, and observe the conditions as he found them, and if he negligently and carelessly fails to do so, and is injured he has no good reason to complain against the railway company." (Record, p. 332.)

Assignment of Errors numbered 3 (Record, pp. 342-343), constituting Specifications of Error numbered 2, 3, 4 and 5 (appellant's brief, pp. 6-7), presents nothing for review by this Court. Said Assignment and Specifications of Error relate to the alleged failure of the trial Court to give four written requested instructions to the jury. As will be shown later and argued at greater length, the Record affirmatively shows that no exceptions were taken by appellant to the alleged failure to give said requested instructions while the jury was still at the bar and prior to the time the jury had retired to deliberate. The failure of appellant to comply with the established rule of this Court, hereinbefore referred to, requiring exceptions to the charge to be taken in the presence of and before the jury retires, precludes, under the decisions of this Court, consideration of said last mentioned assignment and specifications of error.

Assignment of Errors numbered 4, 5 and 6 (Record, p. 344) all relate to the trial Court's permitting certain witnesses, called by appellee, to testify as to the condition in which they found and observed, shortly after the accident, the vestibule and steps of the rear plat-

form of the car where the accident occurred. Said last mentioned assignments of error present nothing for review by this Court because appellant's brief contains no specifications of error with respect to the admission of evidence. It thus appears, as previously stated, that the sole and only question presented for review by this Court is whether there was any evidence of negligence, on the part of appellant, sufficient to warrant the submission of the case to the jury.

APPELLANT'S MOTION FOR A DIRECTED VERDICT WAS PROPERLY DENIED

In considering whether there was any evidence of negligence on the part of appellant, sufficient to warrant the submission of the case to the jury, it should be borne in mind that the relation of carrier and passenger is such that, although the carrier is not an insurer of the safety of its passengers, it does owe, under the law, an extremely high degree of care. The degree of care owing from a carrier to its passengers has been expressed in a variety of ways by the various Courts.

In *Valentine v. Northern Pac. Ry. Co., 126 Pac. (Wash.) 99*, a case cited in appellant's brief, the Court, after stating that the defendant was operating the train in question as a common carrier, said at page 101: "As such it was incumbent upon it to exercise the highest degree of care, prudence, and foresight, for the safety of its passengers compatible with the prac-

tical performance of the duty of transportation. *It would be liable for the slightest negligence with reference to the exercise of such care.*"

In no case, defining the degree of care which a common carrier is bound to exercise towards its passengers, has the rule of law been any better stated than in the decision of this Court in *Northern Pac. Ry. Co. v. Adams, 116 Fed. 324,* where this Court said at page 330:

> "It has long been established that common carriers of passengers are bound to exercise the utmost degree of care, diligence and skill that is practically consistent with the mode of transportation adopted; and, while they are not required to employ every possible preventive which the highest scientific skill might suggest, the law requires such carriers to use the best precautions in known practical use to secure the safety of their passengers."

It should be borne in mind, also, that a motion for a directed verdict is equivalent to a demurrer to the evidence. As stated by this Court in *Brownlee v. Mutual Ben. Health & Accident Ass'n., 29 Fed. (2d) 71,* at page 76:

> "A motion for a directed verdict, like a motion for a nonsuit, is in the nature of a demurrer to the evidence. In its determination the evidence upon the part of the plaintiff must be accepted as true, and every proper inference or deduction therefrom taken most strongly in favor of the plaintiff.

As said by Mr. Justice Harlan in *Travelers' Ins. Co. v. Randolph (C.C.A.), 78 F. 754, 759:*

> 'The jury should be permitted to return a verdict

> according to its own view of the facts, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking a peremptory instruction'."

Appellee was not required to prove that appellant was negligent in all of the respects alleged in his complaint. It was sufficient if the negligence of appellant in any one or more of the respects alleged in the complaint was the proximate cause of his injury and appellant's motion for a directed verdict was properly denied, if there was evidence on any ground of negligence, alleged in the complaint, sufficient to warrant the submission of the issue to the jury. Although appellee's proof, in so far as it relates to said motion for a directed verdict, was not required to go to that extent, it is our contention that there was evidence as to every ground of negligence, alleged in the complaint, sufficient to warrant the submission of every issue of negligence to the jury.

(a) The evidence as to the excessive speed of the train was sufficient.

It appeared from the testimony of appellant's own witnesses that the train involved in the accident was, at the time thereof, traveling over a portion of track where, by reason of some construction work in progress, there was in full force and effect a "slow order", promulgated by appellant, itself, limiting the operation of trains to a speed, it "seemed" to the engineer,

of twenty miles per hour, and such of the train crew as testified on the subject, testified, as it might be expected they would, that, in compliance with said "slow order", the train was traveling at the time of the accident at a speed of from eighteen to twenty miles per hour.

On cross-examination of two of appellant's witnesses testimony was elicited strongly tending to show that the train was far exceeding the speed limit imposed by said "slow order", and warranting the jury in finding that the train was running at a rate of speed as great as fifty miles per hour. We refer to the testimony of the witness, Dannell, who was the engineer, and to the testimony of the witness, Challander, who was the fireman. Both testified that as soon as appellee fell from the train signals were given to stop and that such signals meant to the engineer to stop the train at once. Said witnesses further testified that the train was not brought to a stop after the accident and after the receiving of said signals by the engineer until it had traveled a distance of a half a mile.

Such testimony was so inconsistent with and contradictory of their direct testimony that the train was only going at the rate of eighteen or twenty miles per hour, that both of said witnesses were questioned at some length on cross-examination as to the distance it would require to stop a train consisting of the same number of cars and under the precise conditions prevailing, when going at various rates of speed, and said

witnesses testified that such a train as the one in question, if traveling at the rate of fifty miles per hour at the same place, would require a distance of a half a mile to stop, and that the same train at the same place and under the same conditions, going at a rate of speed of eighteen to twenty miles per hour, could be stopped in a distance of five hundred feet or probably less.

The testimony of said witnesses, together with the reasonable inferences and deductions which the jurors, as the triers of fact, were entitled to draw therefrom, was sufficient evidence to carry the case to the jury on the issue of alleged negligent and excessive speed, and tended strongly to show that the train was being operated at the time of the accident at a rate of speed grossly in excess of the speed limitation of appellant's own "slow order".

The conclusion is not only logical but irresistible that if it took the train a half a mile to stop, and a train of the same kind requires such distance, only in the event it is traveling at the rate of fifty miles per hour, and the same train, traveling at the rate of from eighteen to twenty miles per hour, should be stopped in a distance of five hundred feet or less, that the train involved in the accident was going at the rate of fifty miles per hour. Furthermore, the train was not running on any schedule and "didn't have any too much time" to make the siding at Saco and avoid train No. 3 with which it had a "straight-meet". It was for the jury to say, as

a question of fact, whether, under all of the evidence and circumstances surrounding the accident, appellant, which, under the law, owed the very highest degree of care consistent with the practical operation of its train, was negligent with respect to the rate of speed at which the train was being operated.

For the convenience of the Court we have segregated from the Record and print at this point the testimony to which we have just alluded:

Said witness, Dannell, testified, on direct examination, as follows:

"*Q.* . . . . but for that stretch west of Saco there was a slow order in effect at that time?

A. There was, for about two miles west—from Saco west.

Q. Now, do you have a recollection at this time of exactly what the terms of that slow order were?

A. No, I am not positive, but it seems to me it was twenty or twenty-five miles an hour; *it seems to me it was twenty, though.*

Q. For passenger trains?

A. Yes, sir.

Q. Beginning at a point about two miles west of Saco, near the stockyards. You are familiar with that location?

A. Yes, sir." (Record, pp. 223, 224.)

Said witness, Challander, testified, on cross-examination, as follows:

"*Q.* Those two blasts that were given, what would

that mean to an engineer? What would he be supposed to do on receiving those two blasts?

A. To stop.

Q. Would he be supposed to stop just as soon as he could?

A. Well, *the rule says stop at once;* he would use his judgment, I suppose." (Record, p. 251.)

* * * * * * *

"*Q.* Were you aware of the fact that there was a slow order in existence covering two miles west of Saco?

A. Yes, sir.

Q. You knew that that was the order?

A. Yes, sir.

Q. And then at the time these two blasts were given, you were passing through that construction area, weren't you?

A. Yes, sir.

Q. And how fast would you say the train was going at the time the engineer was given these two blasts?

A. Well, at that particular time the engineer had previously reduced the speed of the train on that portion of the track covered by this order, and at that the time that the communication bells were given, *we were possibly going eighteen or twenty miles an hour.*

Q. Eighteen or twenty miles an hour?

A. To my recollection." (Record, p. 251.)

Said witness, Dannell, further testified, on cross-examination, as follows:

"*Q.* Two miles west of the depot then you should

have the train slowed down to twenty or twenty-five miles an hour?

A. Yes, sir.

Q. And then you should continue that two miles at that same speed?

A. Just about that, yes, as near as I could make that speed.

Q. Up to the end of the construction work?

A. Yes, sir.

Q. How fast were you going with the train before you came to that two-mile point?

A. *Oh, I was going pretty—around forty-five or fifty miles an hour.*" (Record, pp. 228, 229.)

* * * * * * *

"*Q.* You think it took you half a mile to make the stop?

A. Yes, sir.

Q. Wouldn't that indicate, Mr. Dannell, you were going at a faster speed than twenty or twenty-five miles an hour?

A. No, sir.

Q. Does it take half a mile to stop a train of ten cars and an engine?

A. No, sir, not if make a heavy stop.

Q. In what distance—

A. It would if going fifty miles an hour, but at twenty miles an hour it wouldn't take no heavy application to use half a mile to stop in." (Record, p. 232.)

* * * * * * *

"*Q.* Now, then, if going twenty to twenty-five miles an hour, what would be the shortest distance you could stop the train in?

A. Well, sir, you can stop awful quick.

Q. About how—

A. At twenty miles speed I should say in—well, I have—I couldn't tell you exactly, *but I imagine a fellow could stop in about five hundred feet.*

Q. About five hundred feet. If a train were going along at about twenty miles an hour, could stop in about five hundred feet, and you have no independent recollection at this time of just how fast the train was going through this construction work, have you?

A. About twenty or twenty-five miles an hour.

Q. But that is just because you had an order to go that fast?

A. Yes, sir.

Q. If you had been a little behind you might have been going faster than that, might you not?

A. No sir.

Q. Do you recall whether you were on time or not?

A. We had no schedule. All we had was a straight-meet with No. 3 at Saco.

Q. Were you sufficiently on time to make this siding to allow the other train to go?

A. Well, we didn't have any too much time, for them to leave on time; but at the same time we could see them coming four or five miles; five miles; and no sight of their headlight, or anything." (Record, p. 233.)

Said witness, Challander, further testified, on cross-examination, as follows:

"*Q.* I will withdraw that question, and I will ask this: Assuming, Mr. Challander, that you have this very identical train in which you were riding as fireman, consisting as I understand it of eleven coaches and an engine, that very train now, and on that very track, that has been testified to here in the testimony, and suppose that when you were on this main line here, at a point a mile and a quarter or such a matter from Saco, two blast signals were given to the engineer, meaning for him to stop the train at once, if that is what it meant, and suppose at that time he was going at eighteen or twenty miles an hour, how long would it take him to bring the train to this stop—what distance?

A. It depends on the application he makes.

Q. How soon could he stop it if he wanted to?

A. That I couldn't tell you; he could stop very suddenly if he wanted to.

Q. In what distance could he stop if supposed to stop at once?

A. Well, sir, those hypothetical questions, I wouldn't care to answer; I haven't seen any figures or tests on that.

Q. Could he stop in five hundred feet?

A. Yes, sir.

Q. Could he stop in less than five hundred feet?

A. Probably." (Record, p. 253.)

In the face of said testimony, we do not feel that appellant is justified in stating at page 14 of its brief: "there was no attempt made to prove the allegations of excessive speed." We can only reconcile said statement on the theory that appellant means thereby that sufficient evidence of excessive speed was not testified to by any witness called by appellee; but it was not necessary that the testimony be so furnished. It has repeatedly been held that upon a motion for a directed verdict, which comes at the conclusion of all of the evidence, the benefit may be taken of favorable evidence, no matter by which side offered or from what witnesses elicited.

It rarely happens that the injured passenger is in a position to produce witnesses on the subject of excessive speed and testimony of that character must, of necessity, in the great majority of cases be obtained from a hostile train crew. Naturally, their self interest as employees of the carrier sued, sometimes renders it difficult to get as much information and data as might otherwise be secured. For these reasons, any admissions by or favorable statements of such witnesses are of the greatest evidentiary value.

That it may constitute negligence to operate a train at an excessive rate of speed is well established. In volume 10 Corpus Juris it is said at page 972:

> "But the rate of speed at which a train or car is run may be dangerous in view of the circumstances or conditions under which it is operated,

or because the particular place is such as to require precautions in that respect, and under such circumstances and conditions may constitute negligence as to passengers thereon, even though it is less than the rate allowed by statute or ordinance; . . . "

(b) The evidence as to an unusual and extraordinarily violent lurch of the train was sufficient.

The second ground of appellant's motion for a directed verdict is that there was no evidence of any excessive or unusual lurch of the train. Under the authorities hereinafter to be noticed, the testimony of appellee, alone, was sufficient to entitle the submission of this issue of fact to the jury, and for the convenience of the Court we print at this point the most pertinent portions of appellee's testimony on this subject:

"*Q.* And just go ahead and tell what happened to you.

A. Well, I started back through the observation car. I was sitting back pretty well to the rear of the car; there were some others there, and we had been talking, and I got up and started; * * * * I went—started back, and I noticed the usual swaying of the train; of course I had to be careful about that; then before I got to the—between the cars—I can't think.

Court. Vestibule? Door?

A. Vestibule. I noticed that there seemed to be more than the usual amount of movement to the train, but I went on. I thought well, it is only momentarily, *and when I got in between the cars, passing through the vesti-*

bule, and went to go to the next coach, why, there was a lurch, a sudden lurch of the train that threw me. I lunged forward. I don't remember whether I struck the train or not, but I didn't have any feeling of striking anything or touching anything, but I just felt myself going, and I wondered where I would strike, wondered what it was like out there. You know how a man will do when he is going through space, and wondering what he is going to strike on. You live a long time there in a few seconds, and that is what I did. That is the last I can remember.

Q. What is the last thing you remember before the accident?

A. I was going through space. Practically that is the only way I can express it." (Record, pp. 97-98.)

* * * * * * *

"*Q.* And now as you passed from the back end of the observation car, making your way forward to the front of that, and from there on to the next platform, you say that there was the ordinary swaying of the train?

A. Yes, sir.

Q. But that didn't—did that throw you down or injure you in any manner?

A. No.

Q. And then when you were passing on to the platform of the rear of this coach, then this other lurch of the car that you are speaking of?

A. Yes.

Q. Now then, just tell the jury, Mr. Shellenbarger, how that lurch that occurred there compared with this swaying that you have been speaking of, that you noticed as you were walking up through the observation car; *was it the same kind of a lurch?*

A. No. Take the ordinary swaying of the car, you can balance yourself as you walk along, but this movement of the car was such that you couldn't protect yourself, that is, it was violent, I would call it,—well, different; was much stronger—well, it wasn't a swaying; it was a kind of a lurch. You lose your—you can't gain your—you can't gain your balance for a short time." (Record, pp. 99-100.)

* * * * * * *

"*Q.* Now was that a lurch which the sudden stopping of the train would make, do you remember?

A. Well, I couldn't say that; that is my impression, that it would be a sudden stop of the train. It might have been—I think the speed was changed,—that is, I have got that impression some way, the speed was changed, and it would indicate to me that it was a stoppage, movement to stop the train." (Record, pp. 109-110.)

In addition to the testimony of appellee, which, in and of itself, was sufficient to carry this issue of fact to the jury, we have the corroborative testimony of the witnesses, Cornell (Record, pp. 39-40-41 and pp. 55-56); Stuart (Record, pp. 67-68 and pp. 73-74); and J. O. Freck (Record, pp. 148, 149).

There is the further corroborative testimony of the witnesses, Mrs. Georgia H. Cheney and Mrs. J. O. Freck, the most material portions of whose testimony on the subject of the jerking and lurching of the train follows:

Mrs. Cheney, who was riding in the rear part of the very coach from which appellee was thrown, testified:

"*Q.* State whether or not, Mrs. Cheney, anything unusual occurred with respect to the operation of the train, immediately prior to your going back there and observing this condition of this vestibule door; whether anything happened out of the ordinary?

* * * * * * *

A. There was a decided jerk to the train.

Court. What?

A. A decided jerk of the train, enough to throw me against the card table.

* * * * * * *

Q. And state whether or not that decided jerk that you spoke of, was that just an ordinary swaying motion of the train?

A. It was not.

Q. And how violent a jerk was it? Just tell the jury as clearly as you can, so they will appreciate the severity of it.

A. It was forcible enough to throw me against the card table; had not the table been there, I think I should have fallen on the floor." (Record, pp. 61-62.)

Mrs. Freck, who was riding in the same coach as Mrs. Cheney, testified:

"*Q.* And now then, I wish you would state to the jury whether or not prior to this announcement being made that a Sir Knight had fallen from the train—state whether or not there was anything unusual that you observed in the movement of the train.

A. Just a few seconds before the announcement was made there was a very sudden, and I would say rather violent lurch. I was sitting with my back to the engine, and in attempting to describe the lurch, it would throw me backward like this, and the party in front of me was suddenly pushed forward against the table; we had a card table between us.

* * * * * * *

Q. What effect, if any, did this sudden lurch of the train have upon Mrs. Cheney, and have upon yourself?

* * * * * * *

A. Well, she was rather disturbed.

Q. And you were all seated at the table at the time this occurred?

A. Yes, sir.

Q. Now, in what way was she disturbed? That is rather a general term. These gentlemen here they want to know what sort of lurch of the train it was, if there was one. How much did it disturb her?

A. She was thrown forward this way against the edge of the table, and I would say that she was made rather

uncomfortable from feeling the edge of the table against her abdomen, ...

Q. What would you say, Mrs. Freck, as to whether or not this lurch of the train which you have described—state whether or not that was just an ordinary lurch or swaying of the train that might ordinarily occur in the ordinary operation of it, or whether it was an extraordinary and more violent jerk?

A. Well, I would say it would be in the nature of a jerk or lurch similar to when you are riding in a car and you are stopped suddenly, or attempt to stop suddenly.

Q. Mrs. Freck, just answer my question if you can, as to whether or not it was just the ordinary swaying of the train, or an extraordinary lurching of it?

A. It was not the ordinary swaying of the train, it was a lurch forward." (Record, pp. 80-82.)

Notwithstanding the evidence just quoted, counsel for appellant have no hesitation in stating at page 23 of appellant's brief: "In the case at bar the record shows no interruption to the operation of the train at the time of plaintiff's accident. No other passenger is shown to have been affected in any way by the sudden movement complained of." It is also argued that the lurching and jerking of the train, described by appellee and the witnesses corroborating him, must have been a lurching or jerking incident to stopping the train after appellee fell. This suggestion comes with poor grace from appellant as none of the train crew or

other witnesses produced by it testified to the existence, *at any time,* of any lurch or jerk of the train. The contention of appellant throughout the trial was that at no time did anything unusual or extraordinary occur with respect to the operation and movement of the train.

An amusing sidelight with respect to the lurching of trains was afforded by the statements of two of appellant's witnesses. The forward brakeman, McCloud testified (Record, p. 261) that, although he had been railroading twenty-five years, he had *never* ridden on a train that he could say was roughly handled. In striking contrast to his testimony was that of the passenger conductor, Spooner, who testified as follows:

"*Q.* Do trains lurch at times?

A. They do sometimes; yes.

Q. And your experience during that twenty-five years—you have known lots of lurches on trains, haven't you?

A. Certainly have.

Q. And you have known lurches violent enough to throw somebody walking through the train, haven't you?

A. Yes, sir.

Q. For instance, people would be thrown while walking from one vestibule to another, that has happened?

A. Yes, sir.

Q. That would be what you boys call rough handling of the train?

A. Yes, sir." (Record, p. 289.)

Appellee had walked through the vestibules of the train many times during the two days intervening before the accident occurred and he had no difficulty and he did not experience such a jerk or lurch as occurred at the time he was thrown. His testimony and that of the witnesses corroborating him shows that the movement of the train at the time of the accident was not such a jerk or jar as is ordinarily incident to the operation of railway trains. The law relating to the liability of carriers for injuries to passengers resulting from the lurching of trains is thus concisely stated in volume *10 Corpus Juris, at pages 973-4:*

> "It may constitute negligence that the train or car is so operated that, by jerking or jarring, passengers are imperiled who are properly conducting themselves with reference to their transportation, even though they may be standing or moving for the purpose of getting off the conveyance . . . . Thus it may constitute negligence to stop a train or car with such suddenness and violence as to cause injury to a passenger. But in order that the above rule may apply the jerk or jar must be unnecessary or unusually sudden or violent; such jerks and jars as are necessarily incident to the use of the conveyance, and are not the result of negligence, will not render the carrier liable for resulting injuries" . . . .

That the trial Court, in instructing the jury, adhered strictly to the rule of law stated in said text is shown by the following portion of its charge:

> "Now, of course the movement of passenger

> trains in the manner required by modern demands is such that some swaying and jarring and lurching of the train is unavoidable, and the railroad company is not responsible for an injury to passengers that may result from such usual swaying and lurching, but it is responsible for injury to a passenger from unnecessary and violent operation of the train." (Record, p. 334.)

The weight of judicial authority is to the effect that testimony showing an unusual and extraordinarily violent lurching or jerking of a train constitutes a *prima facie* case of negligent operation on the part of the carrier, sufficient to carry the issue of negligence to the jury. The decision of this Court in *Southern Pacific Co. v. Hanlon, 9 Fed. (2d) 294*, a more extended reference to which is elsewhere made in this brief, is sufficient authority for the proposition of law just stated. In that case the plaintiff testified that the sudden stopping and jerking of the train caused her to be thrown to the floor of the car and this Court properly held that such testimony rendered the doctrine or maxim *res ipsa loquitur* applicable and was sufficient to warrant the submission of the issue of negligent operation of the train to the jury.

In *Kentucky & T. Ry. Co. v. Ball, 194 S.W. (Ky.) 785*, plaintiff, a passenger on a *mixed* train, testified that the train came to a sudden and violent stop, throwing her against the arm of the seat. She described the stop as unusual, unnecessary, quick and sudden. Defendant's evidence was that no sudden or violent stop was

made and that nothing unusual occurred. A judgment for plaintiff was reversed because it was held that a certain instruction to the jury incorrectly stated the law with reference to the degree of care owed by a carrier operating a mixed as distinguished from an exclusively passenger train. The Court held, however, that the evidence was sufficient to take the case to jury and that the trial Court had no right to direct a verdict for defendant.

On this phase of the case the Court said, at page 787:

> " . . . . the injured passenger may rest his case when he shows a sudden stop and resulting injury, although he may not be able to explain how or what caused it. The company operating the train is presumed to know why a stop of this sort was made, and if it wishes to excuse itself on the ground that it was necessary or unavoidable in the prudent operation of such a train, it must produce evidence in support of this defense. In this case, however, the defense of the company was that no stop was made that could reasonably be calculated to produce the injury of which Mrs. Ball complains, and of course the company had a right to confine itself to this defense. . . . *We are of the opinion that the evidence of Mrs. Ball, although unsupported, was sufficient to take the case to the jury.*"

In Goldstein v. United Railroads of San Francisco, 202 Pac. (Cal.) 155, the complaint alleged that the motorman turned on the electric current suddenly and with great force, causing the car "to start or bound

forward with great speed". In affirming a judgment for plaintiff the Court said at page 156:

> "Appellant urges . . . that the evidence relating to the circumstances of the accident consisted of mere expressions of conclusions of witnesses that the jerk was unusual and violent. This criticism is not merited. The witnesses testified to physical facts."

The testimony of appellee, showing very vividly what happened to him as he was undertaking to pass from one car to another, cannot rightfully be said to be a mere expression of opinion or conclusion. It was most certainly testimony as to physical facts.

In *Renfro v. Fresno City Ry. Co., 84 Pac. (Cal.) 357*, cited by this Court with approval in said case of *Southern Pacific Co. v. Hanlon*, the following language appears at page 359:

> "Ordinarily a passenger injured while riding on a car is not in position to know more than that by some unusual movement of, or happening to, the car he has received injury. What caused the movement or happening he cannot be expected to know, and it is for this reason and for the further reason that the persons operating the car should know the cause and be able to explain it that the presumption of negligence arises, and that the burden is cast upon the railroad company to explain the cause. The present case fairly illustrates the wisdom and justice of the rule. The proximate cause of plaintiff's injury was the sudden jerking of the car forward when he had reason to believe that it was about to stop. Beyond this he was in no position to know the cause. If such sudden movements of street cars, under like circumstances, are

necessary or unavoidable, in their operation, we think the rule would cast the burden upon the company operating the cars to show this fact as part of its defense."

In *Scott v. Bergen County Traction Co., 43 Atl. (N. J.) 1060,* plaintiff testified that while she was standing on the rear platform of the car, intending to alight when it stopped, the car gave a sudden lurch forward, throwing her to the ground. In affirming a judgment for plaintiff the Court held that the circumstances related by plaintiff, if true, justified an inference of breach of duty on the part of the carrier within the maxim *res ipsa loquitur* and required the submission of defendant's alleged negligence to the jury. It was contended that plaintiff was guilty of contributory negligence, as a matter of law, in failing to take hold of a hand rail, but the Court held that "what the plaintiff was bound to do, under all the circumstances, in the exercise of ordinary care, was a question for the jury." To the same effect is *Consolidated Traction Co. v. Thalheimer, 37 Atl. (N. J.) 132,* where the only evidence of negligence was plaintiff's testimony that the car gave a "lurch" or "jerk" of sufficient force "to throw her right off."

In *Auld v. Southern Ry. Co., 71 S. E. (Ga.) 426,* plaintiff's intestate was seen to go to the rear door of a coach which was not vestibuled and to pass through the door on to the platform. As she left the door there was a sudden plunge or jerk of the train which re-

quired the other passengers to hold on to their car seats. The deceased was found lying on the right of way, having apparently been precipitated from the train by the lurch thereof. In reversing a judgment of non-suit, the Court said at page 427:

> "The circumstances attending the injury . . . were sufficient to make a *prima facie* case against the carrier, and the burden was upon it to overcome the imputation of negligence or to show the passenger's contributory negligence. . . . These facts are not conclusive that Mrs. Auld was thrown or fell from the train by a jerk usual and incident to the ordinary operation of the train. Under the rule just stated, it was a question for the jury to determine whether the defendant was negligent in the operation of the train, and whether under all the circumstances plaintiff's intestate was guilty of such negligence in undertaking to pass from one coach to another as would defeat a recovery."

In *Babcock v. Los Angeles Traction Co., 60 Pac. (Cal.) 780*, also cited approvingly by this Court in said case of *Southern Pacific Co. v. Hanlon*, plaintiff testified that he was thrown from the car by the lurching thereof at a curve. It was there stated at pages 781-2:

> "The Court properly denied the motion for a non-suit. That the evidence given on behalf of the plaintiff tended to establish negligence on the part of the defendant is not open to dispute, and it was for the jury to determine whether it was sufficient for that purpose. When the plaintiff showed that the defendant had assumed to carry him as a passenger upon one of its cars, and that while being so carried he had sustained an injury *by*

reason of the manner in which the car was propelled along the track, a *prima facie* case of negligence was established, which in the absence of any other evidence entitled him to a recovery. In *McCurrie v. Southern Pacific Co., 122 Cal. 558*, we said:

'A *prima facie* case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part'."

In *Richardson v. Portland Trackless Car Co., 113 Ore. 544*, plaintiff testified that while he was standing in the aisle between the seats of the bus, "all at once there was a terrible lurch of some kind, as though it struck a low place or something like that, and I saw the door fly open and out I went, and I suppose that is the last I knew." With reference to the sufficiency of this evidence the Court, speaking through Mr. Justice Belt, said at pages 547-8:

"This evidence, in our opinion, constituted a *prima facie* case of negligence, and therefore *no*

> *error was committed in denying the motion for nonsuit and directed verdict.* The defendant company as a common carrier was obliged to exercise the highest degree of care consistent with the practical operation of its bus in carrying plaintiff safely to his destination. While the defendant is not an insurer against injury, and the mere happening of an accident does not of itself imply negligence, nevertheless it may be inferred by reason of the relation existing between the parties and the manner in which the accident happened. *Assuming, as we must do, that the testimony of the plaintiff is true,* this is a case of *res ipsa loquitur.*"

The further language of said Court, to be found at page 548, is singularly pertinent:

> "Can it be said when a passenger by reason of an unusual lurch is thrown against the door of the bus and out into the street it is an accident that might happen in the ordinary course of things? We think not. In view of the status of the parties hereto as carrier and passenger and the manner in which this accident occurred, we are of opinion that a jury might well draw the reasonable inference that it happened as a result of the negligence of defendant."

The citing of further authorities would be superfluous and an imposition on this Court. It is manifest that the trial Court did not err in refusing to direct a verdict for appellant on the alleged ground that the evidence, relating to an excessive or unusual lurch of the train, was insufficient.

(c) The evidence of negligence with respect to the condition of the vestibule—as to opening—was sufficient.

The next ground of appellant's motion for a directed verdict is that the evidence failed to show that it was negligent in any particular alleged with respect to the condition of the vestibule of the car as to lights, opening, or the method of safeguarding the vestibule, (Record, p. 342). For convenience, we will consider first the evidence and law relating to the open vestibule door and steps and will next consider, combining the two matters under one heading, the evidence and law relating to lights and the method of safeguarding the vestibule.

In the complaint, as amended, (Record, pp. 5-6), it is alleged that appellant negligently suffered and permitted the train to be in an unsafe condition and dangerous to passengers, who might be in the act of passing from one car to another, in that the vestibule door and steps, on the car from which appellee was thrown, were allowed to be and remain open and exposed between stations, at a time when the train was still in rapid motion, and in that said vestibule door and steps were so open and exposed at an improper and unsafe place in the train.

In its answer, (Record, pp. 11-12), appellant denied that said steps were open but expressly admitted that said vestibule door was open, at the time appellee was injured, and, with reference to said open vestibule door,

appellant, by way of an affirmative answer and defense, alleged, in substance, that an employee of appellant, whom the evidence shows to have been the rear brakeman or rear flagman, had, in the regular discharge of his duties in connection with the operation of the train and in the exercise of due care for the safety of the train and the passengers thereof, opened said vestibule door.

Said affirmative allegations of appellant's answer were denied by appellee's reply (Record, p. 13), so that with respect to said steps there was an issue as to whether they were open or not and with respect to said vestibule door there was an issue, which was limited, under appellant's admission, to the question of whether allowing said vestibule door to be so open constituted negligence.

The vestibule door referred to was, when considered with relation to the direction the train was traveling, the lefthand vestibule door of the rear platform of the coach immediately ahead of the observation car—the latter being the last car in the train. The steps referred to were the steps located on said lefthand side of said rear platform of said coach. The testimony showed that when the "trap" covering said steps was raised it left said steps open so they could be used to stand on or for the purpose of descending from or boarding the rear platform of said coach and that when said "trap" was closed it covered said steps and became a part of the surface of said rear platform.

At the time of the accident, which occurred at about ten thirty o'clock at night, appellee, who had been in said observation car and was intending to go to his berth for the purpose of retiring, was undertaking to pass from said observation car into the said coach next ahead and it was through said open vestibule door that appellee was thrown, as he contends, by a sudden and unusually violent lurch of the train, or, as appellant contends, appellee walked.

Appellee contended, among other things, that said vestibule door and steps should not have been open at a time when the train was not stopped to discharge or receive passengers but was in rapid motion and that said rear brakeman or flagman should have performed whatever work he was undertaking to perform for appellant at the time at the rear end of said observation car, a place where there would be no passengers passing back and forth, and that the opening of said vestibule door was in violation of a standard operating rule of appellant, and that said vestibule door was opened wider and sooner than was necessary and that said vestibule door was unnecessarily left open for a longer period of time than any operating necessity demanded. Appellant contended, as alleged in its answer, that said vestibule door was necessarily open at the time appellee was injured to enable said rear brakeman to carry on his work.

As disclosed by the Record, the train was to take a siding at or near the town of Saco, Montana, in order

that a westbound limited train, which had the right of way over it, might pass. It was the duty of said rear brakeman, so he testified, after the train had pulled completely into said siding and cleared the main track and stopped, to get off and close the side track switch and then re-board the train, and said rear brakeman testified that it was also his duty to be on the lookout for the purpose of protecting the *rear end* of the train against any oncoming train. The Record shows that at the time appellee was injured the train was in rapid motion. It was neither discharging nor receiving passengers, and there was no occasion for any such purpose to have said vestibule door or steps open, and the issue was squarely presented, as above outlined, as to whether said vestibule door or steps necessarily had to be open for the practical operation of the train.

The trial Court held that said issue was an issue of *fact* to be determined by the jury under the guidance of the Court as to the principles of law applicable to the case. In other words, the trial Court refused to say, as a matter of law, that it was negligence to have said vestibule door and steps open and refused to say that it was not negligence and of this appellant complains. The determination of such issues, not being a matter of law but a matter to be decided according to the attending facts, the trial Court properly left the determination thereof to the jury.

So, this Court will find that in the charge to the jury the trial Court, without alluding particularly to said

steps, said: "The vestibule door, therefore, should not be open, but should be kept closed while the train is in motion, unless it is impossible to do so in the practical operation of the train, and it is a question of fact in this case whether or not the opening of this vestibule door by the brakeman was necessary in the practical operation of the train. If it was, then it was not negligence to open it; if it was not, then it was, and if the opening of the door was the proximate cause of the injury to plaintiff, then he would be entitled to recover." (Record, p. 334.) Under the authorities later to be referred to, the leaving of said matter, in this fair manner, to the jury, was all that appellant can reasonably ask.

It appeared that said vestibule door was not only open but that it was opened completely and latched back to the body of the coach (Record, p. 278). For the convenience of the Court we will at this point print the important portions of the testimony relating to said open vestibule door and the non-necessity, as appellee contends, of its being open and will follow it with the important portions of the testimony relating to said steps or "trap" being open. We believe said testimony will not only show the earnestness and sincerity with which the jurors performed their function of trying to get at the true facts, but will satisfy this Court that, bearing in mind the extremely high degree of care owing from a carrier to its passengers, there was no operating necessity for said vestibule door or

steps being open, and that the jury was well warranted in finding against appellant on said issues of fact, so submitted by the trial Court.

The witness, Brown, who was said rear brakeman or rear flagman, testified as follows:

"*Q.* You could have had this door in the same position shown in this photograph here, this Defendant's Exhibit "I", and have stood there in this opening between this side of the door and the back of the vestibule, couldn't you?

A. Yes, sir.

Q. And then looked from that point ahead along the train, and towards the engine, to make whatever observation you wished?

A. I could have, but it would have been kind of a dangerous position.

Q. Would have been dangerous to you?

A. Yes, for me.

Q. Would not have been dangerous for the passengers, though?

A. I presume not; not as dangerous, at any rate." (Record, p. 297.)

* * * * * * *

"*Q.* So that for a minute of time then, while the train was in motion, the left hand vestibule door at the rear coach ahead of the observation car, was open?

A. Yes, sir.

Q. And fastened back to the body of the car?

A. Yes, sir." (Record, p. 299.)

* * * * * * *

"*Q.* . . . . So if you had wanted to you could have gotten off this train at this time at the rear of the observation car, and closed your switch and gotten on at the rear end, couldn't you?

A. Yes, sir.

Q. And in doing that you could, if you had wanted to, either opened up the back of the observation car, or have jumped over the rail, as you finally did?

A. Yes, sir." (Record, pp. 301, 302.)

* * * * * * *

"*Q.* So you could have, if you wanted to, gone back to the rear of the observation car, and without opening the door, have looked along the track?

A. Yes, sir.

Q. And if you had wanted to get off you could have opened the door?

A. Yes, sir.

Q. And gotten down there?

A. Yes, sir." (Record, p. 302.)

* * * * * * *

"*Q.* I will ask you if the printed regulation isn't that you should occupy at the night time always the rear end of the train?

A. During the night—

Q. At night time I mean.

A. During the night hours—

Mr. Rockwood: Just a moment; the rule is the best evidence, and is already in evidence. I have no objection to asking if that is the rule.

A. Yes, sir." (Record, p. 303.)

* * * * * * *

"*Juror:* How far from the switch, west of the switch, was it when you opened the door?

A. Right at a mile.

Juror: Where?

A. Right at one mile west.

Juror: Why did you open at that distance from the switch? What is your custom? Your opening of the door, as I understand it, is to get off when the train has got into the siding, close the switch, and then walk around the back end and signal to the engineer to go ahead. Isn't it?

A. There is no specified distance where we shall open the doors, but we have a rule that compels us to get off on the opposite side of the track from the switch.

Juror: I was wondering why you opened it so far away from the switch, when there was no necessity of opening it until you got to the switch?

A. Well, we had a slow order, and it was to observe the movement of the train, and the general conditions.

Juror: You say it was about a mile back from the switch?

A. About a mile; yes.

Juror: They had not stopped for the switch, of course.

A. Oh, no, no." (Record, p. 317.)

* * * * * * *

"*Court:* Then there was no necessity of your dropping off the train until it passed in on the siding?

A. Until I came to the switch; but it was my duty

to see where I could—be at my position of duty so I could drop off when the time came.

Court: The train stops before it enters the switch?

A. Yes, sir.

Court: After the front brakeman has opened the switch?

A. Yes, sir." (Record, pp. 318, 319.)

* * * * * * *

"*Juror:* No occasion for you to get off the train until it gets into the siding and you get off at the switch and close the switch on the opposite side from the engineer?

A. Not necessarily opposite from the engineer; but I get off by the switch as the train pulls by, on the opposite side of the track from the switch.

Juror: But you don't get off until the rear coach, which you are supposed to have been in—you don't get off until that has either reached the switch or passed through it?

A. Until it reaches it; yes, sir.

Juror: As I understand, you opened this door a mile or more prior to that; and I can't understand why you did that, as long as it wasn't necessary, and the train moving at that rate of speed.

A. We don't consider twenty miles an hour very fast speed, if we were going twenty, and the train was slowing down, and I was in position in case we stopped there. You never know on a slow order when you are going to stop, and I was in position, if necessity required it, to drop off." (Record, p. 319.)

* * * * * * *

"*Juror:* Wouldn't it, as a matter of fact, been soon enough to open that door when the train stopped, when the front end of the train got to the switch and stopped to open the switch, wouldn't that be soon enough to open the door?

A. Well, close to the switch, yes, sir.

Juror: Because you had the full length of the train to go in before you needed to get off.

A. Yes; but we are supposed to be at our position of duty, where we can perform our duty at any time; between the stations, or any place.

Juror: You could have been just inside the door, and when the train stopped you would know stopped to open the switch, and then open the door, and as the train was coming back and coming to that switch, you would have had plenty of time to open the door and get off?

A. Yes, sir.

Juror: Your duty is to close the switch?

A. Yes, sir, that is one of them.

Juror: Now, could you perform it any better by getting the door open a mile back, than you could to open the door at the time your train got on the siding? Or, to put it another way, as Mr. Ross asked you, when the engine comes to the switch and the front brakeman, the head brakeman, opens the switch, if you got off then would you leave the door open and then walk the entire length of the train in order to perform that duty of closing the switch after the train

got on the siding; or really, was there any necessity, then, of your opening the door until the train did get on the siding?

A. Well, as it turned out, no. But when the train slowed down I wasn't figuring on the switch then, because I knew we wasn't to it by a mile; but I was figuring on protecting the train as flagman." (Record, pp. 321, 322.)

With reference to the violation by said rear brakeman of said standard operating rule of appellant in not being stationed, at the time of appellee's injury, at the rear end of said observation car and in not performing his flagging or other duties from that place in the train, important testimony was elicited from appellant's witnesses. The witness, Challander, who was the fireman, testified, on that subject, as follows:

"*Q.* I will ask you then to refer to this Great Northern book, Mr. Challander, and read that Section 836 there. You need not read it out loud, just read that over to yourself, then I may compare them.

A. You want me to read this to the jury, sir.

Q. No, no, just read it over to yourself, and satisfy yourself that was the rule. I will ask you to read that, and state whether or not that rule there was in effect on the 13th of July, 1928, at the time this accident occurred?

Mr. Rockwood: I will stipulate it was.

A. This book was in operation—this date in this book shows it was in 1921.

Mr. Rockwood: That book of rules was still effective.

A. This was still effective in 1928.

Mr. Dibble: We will offer that rule in evidence.

Mr. Rockwood: I have no objection to it being read, but I do not want the book out of my possession.

Mr. Dibble: "The proper position for the rear passenger brakeman, while his train is in motion, is in the last car of the train, regardless of whether it is an observation, sleeping or private car, but during daylight hours he should get off the head end of such car. At night he must ride in the rear end of the rear car and must have near at hand the necessary flags, lanterns, fuses and torpedoes." (Record, pp. 248, 249.)

The witness, Spooner, who was the conductor, testified, on the same subject, as follows:

"*Q.* Now, then, Mr. Spooner, this train was governed, as far as the movements of the rear brakeman were concerned by this rule I have read here, Rule 836?

A. Yes, sir.

Q. That is the standard rule governing the operation of trains?

A. Yes, sir." (Record, p. 265.)

* * * * * * *

"*Q.* And this accident occurred around about what time of the night? Somewhere around about ten thirty, wasn't it?

A. About ten thirty, yes.

Q. And the rule there would be—wasn't this rule in effect here: "At night,"—referring to the rear brake-

man—"he must ride in the rear end of the car, and must have near at hand necessary flags, lanterns, fuses and torpedoes." This was in effect at the time?

A. Yes, sir." (Record, p. 267.)

Upon the issue as to whether said steps or "trap" were open there was, in addition to the direct testimony presently to be quoted, the inferences to be drawn from the testimony of appellee. In passing from the observation car to the coach ahead he would naturally walk along the surface of the platform between the steps on either side. In his description of what took place appellee stated that when the sudden and violent lurch of the train occurred he completely lost his balance and felt himself passing through space. It is a fair inference from his testimony that the steps were open. Otherwise, he would not unlikely have struck against and been stopped by the body of the coach. The steps being open, he dropped clear through the vestibule and out on to the right-of-way.

The proof that the steps or trap were open at the time appellee was injured does not depend upon the reasonable inferences deducible from his testimony. There was direct testimony to that effect given by the witnesses, Mrs. J. O. Freck and her husband and by appellant's witness, Brown, the rear brakeman.

Mr. and Mrs. J. O. Freck were seated at a card table near the rear platform of the coach from which appellee fell and as soon as announcement was made that an

accident had happened they hurried to the door and observed the condition in which said rear platform and vestibule then was. They found the lefthand rear vestibule door open and the steps or "trap" on the lefthand side open as well and both so testified.

On this subject, Mrs. Freck testified, in part, as follows:

"*Q.* What was the first notice you had that there had been an accident?

A. . . . . Some party stepped to the door . . . . and said 'We have lost a Sir Knight'." (Record, p. 77.)

* * * * * * *

"*Q.* Now will you state . . . . what, if anything, you did immediately thereafter, after that was said?

A. Well, the men folks immediately rushed, and we women folks as fast as we could follow.

Q. And how soon did you rush out yourself after this announcement had been made?

A. Right immediately." (Record, p. 78.)

* * * * * * *

"*Q.* Now, when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion and was not yet at Saco, what condition did you find the vestibule of that coach to be in?

A. When we rushed out into this vestibule the men folks were first, and I was right after them, *and the trap was open, and the door was open.*

Q. And on which side? On which side of the vesti-

bule was the opening with respect to the direction the train was going?

A. Well, as far as my sense of direction is concerned, I think it was on the left side." (Record, pp. 79, 80.)

Mr. Freck testified on this same subject, in part, as follows:

"*Q.* What was the first notice you had that there had been an accident?

A. Well, we were—Mr. and Mrs. Cheney and Mrs. Freck and myself were sitting in the last compartment on the car, that is the end next to the vestibule of the observation car, playing bridge, and the first notice that we had of any accident or anything, some one stuck their head in our door and hollered that one of the Sir Knights had fallen off the train.

Q. And after that occurred, state whether or not you got up and went to see what had happened?

A. Yes, sir.

* * * * * * *

Q. What did you do after that announcement was made?

A. Mr. Cheney and I jumped up and rushed outside, out to the vestibule.

Q. State when that was with reference to the time that they said the Sir Knight had fallen off the train; how long after that announcement was made did you get off it?

A. I don't understand the question.

Court: How long after you were told someone had

fallen off the train was it that you went to the vestibule?

A. *Immediately.*

Q. And state what condition the train was when you went back there, as to being in motion or not.

A. We didn't go back; we were right there at the vestibule. The door of our compartment was right at the door of the car and in other words, it was next to the platform of the train—of the vestibule of the train where the Sir Knight fell off the train.

Q. When you went back there state whether or not the train was in motion.

A. The train was in motion when we jumped out, yes. When this Sir Knight hollered in the drawing-room to us the train was in motion, yes.

Q. Had it stopped yet after the accident? Had it got to Saco?

A. No, sir.

* * * * * * *

Q. *What was the condition of the vestibule when you went back there, as to being open or otherwise?*

A. *The door to the vestibule was standing open from where—we went out on the vestibule, and the vestibule door and trap was open when we got out there, Mr. Cheney and I.*

Court: On which side of the train?

A. It was on the north side of the train, sir.

Q. Which side would that be, left or right, as you

would come from the observation car and be going towards the engine?

A. On the left." (Record, pp. 146-148.)

Upon the trial appellant's counsel objected to the testimony of said last mentioned witnesses on the ground that it did not appear that their testimony related to the condition of the vestibule door and "trap" at the *precise* time appellee fell. The Court held, however, and properly, that their observance of conditions occurred at a time so soon after the accident as to render said testimony admissable and that appellant's objection went to the *weight* rather than to the *relevancy* of the evidence. Although the admission of said testimony is included in the Assignment of Errors and it was stressed upon the argument of appellant's motion for a new trial that error was committed in receiving said testimony, appellant has abandoned its former contention in that regard and acquiesced in the trial Court's ruling, for there is not included in appellant's brief any Specifications of Error relating to the admission of evidence. As hereinbefore stated, this Court has held that assignments of error, which are not included in the specifications of error to be relied on and urged, are considered waived and abandoned.

In justice to the trial Court and in support of the ruling made, we call this Court's attention to the following authorities: *Jones v. City of Seattle et al 98 Pac. (Wash.) at p. 744; Johnson v. City of Sioux City 86 N.W.*

(Iowa) at p. 213; Gulf etc. Ry. Co. v. Fowler 122 S.W. (Tex.) at p. 596; Meyers v. Highland Boy Gold Min. Co. 77 Pac. (Utah) 350; Missouri etc. Ry. Co. v. Oslin 63 S.W. (Tex.) at pp. 1042-3; Texas Midland R. R. Co. v. Brown 58 S.W. (Tex.) at p. 45; and *Enc. of U. S. Sup. Ct. Reports, volume 5,* wherein it is said at page 1013:

> "It is undoubtedly true, that questions respecting the admissibility of evidence are entirely distinct from those which refer to its sufficiency or effect; they arise in different stages of the trial; and cannot, with strict propriety, be propounded at the same time. Accordingly, it is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. *It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the nonexistence of the disputed fact.* The reason for this is that relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. *And in this regard the trial Court may exercise a wide discretion which a Court of errors will not interfere with.*"

It is urged in appellant's brief that the testimony of Mr. and Mrs. Freck is of no evidentiary value but to our minds it was the strongest kind of evidence that the steps or "trap" were open when appellee fell through. The only trainman or other person on said rear platform at the time were appellee and the rear brakeman. The conductor and forward brakeman were in the baggage car and neither they nor any other

trainman testified to opening the steps or "trap" at any time after the accident. As soon as the accident happened said rear brakeman ran back through the observation car, excitedly announcing that appellee had fallen. He did not say that he opened the "trap" after the accident.

The open condition of the vestibule door and steps —both on the same side, the lefthand—which said witnesses found, immediately after the accident, must have been the condition in which they were left by said rear brakeman. It is rather subtly hinted in appellant's brief that some passenger may have opened the "trap". Any such argument is most unreasonable. No passenger was shown to have done so and it is common knowledge that passengers do not do such things.

Appellant expended some effort on the trial, directed to showing the simplicity of the trap and the ease with which it could be lifted and fastened. What may be known by a trainman, familiar with appliances daily used by him, is not known by the average passenger and the ordinary passenger knows better than to tamper with railway equipment. Of one thing we may be morally certain, no passenger at the hour of ten thirty at night opened the steps of the rapidly moving train.

We conclude our reference to the testimony, showing that said steps or "trap" were open, at the time appellee was injured, with a quotation from the testi-

mony given by said rear brakeman, himself. Although one would naturally assume that instead of standing on the platform, several feet above the road bed, he would have had the steps open and being standing on one of them and leaning out, preparatory to alighting to close the switch, he testified, in answer to questions by counsel, that he had the "trap" closed and was standing on it. Late in the trial, however, and at an unguarded moment, while he was being closely interrogated by one of the jurors, rather than the attorneys, he forgot his story and "let the cat out of the bag", so to speak, and testified as follows:

"*Juror:* You opened the door about a mile back?

A. Yes, sir.

Juror: Of where it was necessary to have it open so you could get out of the car and perform your duties?

A. Opening that trap put me in position to perform my duty in case the train stopped before we got to the switch. My duties require me to go back and protect the rear of the train; as soon as it is stopped, proceed back with the proper equipment to stop any following train." (Record, pp. 320, 321.)

From all of the testimony heretofore printed in this brief, relating to said open vestibule door and said open steps or "trap", the jury was well warranted in finding any one or more or all of the following to be true:

First: That said vestibule door need not have been completely opened and latched back. For the purpose

of seeing when it was necessary for him to alight and close the switch, the rear brakeman could just as well have held the door only partly open, and had he done so his body and the door partly closed would have prevented any passenger having occasion to pass that way from falling or being thrown from the train. So far as the flagging part of said rear brakeman's duties was concerned, the evidence of appellant's own witnesses was that under said standard operating rule the rear brakeman was not where he belonged. It being *night time* he should have been at the *rear end* of the observation car, protecting the *rear end* of the train from oncoming trains.

Second: That said vestibule door and steps were open for an unreasonable and unnecessary length of time. There was no operating necessity requiring the opening of said vestibule door or "trap" a mile ahead of the place where said rear brakeman was to alight. Said vestibule door need not have been open for a whole minute—as he testified it was—prior to the time he would have occasion to alight. During such an interval many passengers might be passing back and forth between the cars. So far as the switch-closing was concerned, said vestibule door and "trap" could well have been kept closed until the engine arrived at the entrance to the switch. The train would there stop because it could not go into the siding until the switch was opened. Then, would have been amply soon enough to open the vestibule door and steps. Their

opening could even have been longer deferred as said rear brakeman was not required to get off and close the switch until the entire train had cleared the main track and taken the siding.

Third: That the rear brakeman could have done everything that he testified he was required to do, with equal or to better advantage had he been on the rear platform of the observation car. He testified, page 302, Record, that the railing on the lefthand side of the rear end of the observation car could be opened and had a "trap" and steps leading to the ground. The two platforms were of the same standard height. He could have looked around the rear end of the observation car and seen ahead just as far and well as he could from the rear end of the next coach. From the standpoint of safety to himself the rear platform of the observation car was the better place. The railing enclosing it would have served as a protection, enabling him to lean far out, without danger of falling. Had he been on the rear platform of the observation car, where under the standard operating rule of appellant he belonged, it would, most certainly, have been safer for the passengers and, in view of the extremely high degree of care owing from a carrier to its passengers, the safety of the passenger should be and is the first consideration.

Fourth: That in undertaking to perform the flagging part of his duties—the protecting of the rear end of the train, while it was passing through the area of track

where construction work was in progress—at the rear platform of the coach ahead of the observation car, said rear brakeman was acting in defiance of Section 836 of the standard operating rules of his employer. Said rule is shown in its entirety at page 249, Record, and as appellant's counsel insisted "speaks for itself". Said rule expressly and specifically provides that whether the last car of the train be "an *observation*, sleeping or private car" the rear brakeman *must* at night "ride in the rear end of the rear car and must have near at hand the necessary flags, lanterns, fuses and torpedoes". He was not there and, instead, opened the vestibule and "trap" of the car ahead of the observation car. If he could properly do this, then it follows that, with equal propriety, he could have opened the vestibule and "trap" of any other car on the train and, with immunity to appellant, endangered the life and limb of its passengers.

Many splendid decisions have been rendered with reference to the liability of passenger carriers for injuries resulting from open vestibules and in our presentation of the law applicable to the facts of this particular branch of this case we will confine our citation of authority to decisions analagous in point of fact.

Bronson v. Oakes, 76 Fed. 734, is one of the earliest and, perhaps, the leading case dealing with this subject. The law therein declared has never been overturned or modified. On the contrary, the decision is not infrequently cited approvingly by other Courts. In that

case plaintiff was riding at night in a vestibuled train and while walking through it fell through an outside vestibule door, which had been left open. A demurrer to the complaint had been sustained but this the Court held was error. The decision contains a very exhaustive and learned treatise on the question as to when a case may be decided by the Court, as a matter of law, and when it should be submitted to a jury for the disposition of disputed questions of fact. All that the Court said in that regard is germane to appellant's motion for a directed verdict but we will quote only part. The following may be found at pages 739-740:

> "Probably the most satisfactory statement of the rule, and the one easiest to comprehend and apply (Scott v. City of St. Louis, 75 Fed. 373, 377), is that given by the supreme court in Railroad Co. v. Ives, 144 U. S. 417, where it is thus stated: 'When a given state of facts is such that reasonable men may fairly differ upon the question of whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the courts.' . . . If there is any doubt as to whether all reasonable men would draw the same conclusion from the evidence, then the question must be submitted to the twelve reasonable men appointed by the Constitution to determine disputed or doubtful questions of fact."

Speaking of vestibules and the obligation of carriers with respect thereto, the Court said, at page 740:

> "The defendants were under no legal obligation

> to provide vestibuled trains for their passengers, but, having done so, it was their duty to maintain them in a reasonably safe condition. Railway Co. v. Glover (Ga.) 18 S. E. 406, 414. The purpose of the vestibuled cars is to add to the comfort, convenience, and safety of passengers, more particularly while passing from one car to another. The presence of such an appliance on a train is a proclamation by the company to the passenger *that it has provided him a safe means of passing from one car to another*, and an invitation for him to use it as his convenience or necessity may require."

At page 39 of appellant's brief the suggestion is made that perhaps appellee momentarily lost his sense of direction and mistook the open vestibule door for the door of the coach he desired to enter. Although there was no proof to that effect, we are unable to see how it would relieve or excuse appellant for its negligence in having said vestibule door and steps open. In this connection, the following language taken from page 741 of the opinion in *Bronson v. Oakes* is pertinent:

> "Moreover, that optical illusion would have been harmless but for the negligent act of the defendants. The vestibule was intended to prevent injury to the passenger while passing through it, from optical illusions as well as from any other cause. In other words, it was designed to prevent every kind of injury that could be prevented by keeping the vestibule in a safe and proper condition. The plaintiff in error was not bound to anticipate the particular act of negligence on the part of the defendant which occasioned the accident."

Although the former contention of appellant that appellee was guilty of contributory negligence, as a matter of law, has been abandoned, we can not refrain from quoting the following from pages 212 and 213 of the opinion in *Robinson v. United States Ben. Soc. 94 N.W. (Iowa) 211:*

> "It is urged that Mr. Robinson was, under the undisputed facts, guilty of contributory negligence in passing from his car to the dining car while the train was running at full speed. . . . . In a vestibule train there is no more danger in passing from one coach to another, than in passing from one seat to another in the same car. Dining cars are attached, and one of the purposes of the vestibules is to make it safe for passengers to pass from car to car. Mr. Robinson *had the right to assume that the vestibule doors were closed, and that it was safe for him to pass through.* If the railroad company had removed these safeguards, it was incumbent upon defendant to show that Mr. Robinson either knew or should have known it. It failed to make any such showing. The railroad company had made the means of passage safe, and invited him to pass, and he was not negligent in accepting the invitation. Bronson v. Oakes, 76 Fed. 740; Marquette v. C. & N. W. Ry. Co., 33 Iowa, 562."

In *Rivers v. Pennsylvania R. Co., 83 Atl. (N. J.) 883,* the four rear coaches of the train were vestibuled and while plaintiff was at night walking from one of such cars to another, for the purpose of finding a seat, there was a sudden jerk of the train and he "stepped into space and plunged down the steps and fell upon the roadbed, because the trapdoor, which, when in place,

covered the space over the steps had been removed". In reinstating a judgment for plaintiff that had been previously reversed, the Court said, at page 884:

> "Generally speaking, the legal duty of the defendant is well settled. A common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate. By foresight is meant not foreknowledge absolute, not that exactly such an accident as happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent. . . . And when such company has assumed to safeguard passengers using such vestibule, while the train is running between stations, by providing a trapdoor to cover the space over the steps, it is bound to use reasonable care to maintain it in proper position."

In *Crandall v. Minneapolis etc. Ry. Co., 105 N.W. (Minn.) 185*, the only negligence charged was that vestibule doors were left open between stations for an unnecessary length of time. It was held that whether the doors were allowed to remain open for an unreasonable length of time and whether said alleged negligence was the proximate cause of the accident were questions of fact and that the defendant was not entitled to directed verdict.

In *Robinson v. Chicago & A. R. Co., 97 N.W. (Mich.), 689*, plaintiff's intestate, a passenger on a train which was shown to have been lurching considerably, was last seen alive going out of one sleeping car for the

next one, which he did not enter. He was afterwards found dead beside the track. It was contended, as it is in the instant case, that to find that the deceased was thrown through the open vestibule door by the lurching of the train would be basing a judgment upon guesswork and conjecture. In disposing of this contention adversely, the Court said, at page 690:

> "It is urged that the manner in which Mr. Robinson met his death is mere conjecture, and that, therefore, there can be no recovery. This position is untenable. It is a fair inference from the evidence adduced in behalf of the plaintiff that Mr. Robinson was thrown through the vestibule door. He was seen to go out of car No. 4 for car No. 3, which he did not enter. The natural conclusion is that he either voluntarily jumped from the car through this door, or was thrown through it by the lurching of the train. There is nothing to indicate that he intended to commit suicide by jumping from the car."

In *Kearney v. Oregon R. & N. Co., 59 Ore. 12,* there was a failure on the part of the train crew to close a vestibule door after discharging passengers at the last station. The depot of the next station was on the opposite side of the track from the last one, so there was no operating necessity of longer having said door open. The train reached this next station about 2:35 o'clock in the morning. Plaintiff was riding in the car the door of which had so been left open. It was a vestibule car with a door on each side and trapdoors in the floor over the steps. Plaintiff, desiring to alight at this next

station, walked to the platform as the train was approaching it. Both doors of the vestibule were at that time open, namely, the one left open on leaving the last station and the one on the station side of the station where plaintiff was to get off. He was last observed "standing just inside the car door facing the platform." "A short distance below the station the train slowed up considerably, causing a heavy jerk." Plaintiff had two companions who preceded him. They alighted safely and, missing plaintiff, went in search of him, finding him lying beside the track about the place where the jerk of the train occurred. So far as the opinion of the Court discloses, there were no eye witnesses to the accident.

The lower Court denied a motion for a nonsuit, the grounds of which are not shown, and defendant appealed from a judgment for plaintiff. In affirming the judgment, the Court said, at page 16:

> "While the evidence might not appear to all minds to be conclusive, we are of opinion that it was sufficient to justify the Court in submitting the case to the jury. . . . It is not unreasonable to suppose that he was thrown through the front door of the car upon the platform, and fell from there through the open south door of the vestibule. . . . A natural and reasonable inference from the facts testified to by plaintiff's witnesses is that the jar of the train threw him *forward* and that . . . . he was unable to recover himself and fell off the platform through the side door."

The Justice who wrote the opinion in said case goes

on to enumerate reported cases of like happenings in language that should be a sufficient answer to the following statement shown at page 8 of appellant's brief: "The testimony offered in support of these allegations makes the accident to plaintiff one extremely difficult of explanation." There is an old saying to the effect that none are so blind as those who will not see. If appellant's counsel will once become reconciled to admitting that the true facts are as they were conscientiously found by the jury, they will no longer experience difficulty in understanding how appellee came to be injured. If appellee was thrown through the vestibule door, one can readily understand why the rear brakeman grabbed for him and missed him and appellee landed on the right-of-way. If the unreasonable and improbable story of the rear brakeman is accepted, that appellee walked up to him in the vestibule and, as though wanting to attract his attention, lightly touched him on his "right forearm near the wrist" (Record, p. 305), then you do have a situation rendering any reasonable accounting for the accident perplexing.

With respect to the sufficiency of the evidence the Court further said, at page 17 in said Kearney case:

> "We think that there was evidence sufficient to go to the jury upon the question of negligence of defendant's employees in leaving the door of the vestibule open. The object of having vestibuled trains is to assure the safety of persons who have occasion to go upon the platform. Except at sta-

> tions, it was the duty of defendant to use diligence to keep the vestibule closed, and there is some evidence tending to show a lack of diligence in this instance. A vestibule with the doors closed cannot be said as a matter of law to be a dangerous place. In fact, it is nearly as safe as the car itself, and to leave the doors open when the cars were still in rapid motion was an omission from which a jury would be justified in inferring negligence."

In *Miller v. Pennsylvania R. Co., 154 Atl. (Pa.) 924*, decided April 13, 1931, plaintiff's case depended entirely upon his own testimony and a judgment in his favor was affirmed. It was urged on appeal that plaintiff's testimony "was contradictory to such extent that the jury could only have guessed as to how the accident happened." The following quotation from page 925 gives both the facts and the law:

> "We have examined the record and note that plaintiff's proof as to the manner of the happening of the accident *is contained in his own testimony.* He testified that he left the car in which he was riding, intending to proceed to another car for the purpose of procuring a drink of water; that as he was passing over the platform between the two cars the train lurched with such force as it rounded a curve as to throw him through the vestibule door to the ground. . . . With these facts in evidence, it is sufficient to say, upon proof of negligence, that 'a presumption of negligence arises from an accident to a passenger when it is caused by a defect in the road, cars or machinery, *or by want of diligence or care in those employed,* or by other things which the company can and ought to control as a part of its duty to carry passengers safely.' . . . . The jury properly inferred from the

> facts presented that the car door was either left open by defendant's agents . . . . or had been improperly closed and secured following the preceding stop of the train."

We will conclude our discussion of the law relating to this branch of the case with a reference to *Northern Pac. Ry. Co. v. Adams, 116 Fed. 324*, a decision with which this Court—the Ninth Circuit—is, doubtless, especially familiar as it was rendered by it. All of the cars involved there were vestibuled with the exception of a sleeper and the train had been publicly advertised as being a completely vestibuled train. As a result of falling from the train the passenger was killed and the evidence, except as to the excessive speed of the train and its violent and unusual lurching, at the place where the passenger fell, was largely circumstantial. He was last seen alive walking through the train from the dining car towards the smoking car, between which two cars said unvestibuled sleeper was one of the cars intervening, and it was claimed that he was thrown by the lurch of the train through the unvestibuled platform of said sleeper.

The only negligence alleged in the complaint, aside from the charge of excessive speed at a curve in the track, was the leaving of an unguarded opening at the side of the platform of said sleeper or, in other words, the failure to have said platform enclosed by a vestibule. After stating that the law requires carriers "to use the best precautions in known practical use to

secure the safety of their passengers" this Court said, at pages 330-331:

> "Whether the carrier has done so or not *is a question of fact*, depending upon the peculiar circumstances of each case, *which circumstances are to be compared and weighed by the jury*, and the existence of negligence as a fact decided by them by the application of the principles of reason to such circumstances."

It was held that it was proper to submit the question as to whether it was negligence on the part of the railway company not to have said sleeper vestibuled to the decision of the jury, under proper instructions from the Court as to the degree of care owing and this Court further said, at page 331:

> "The instructions given by the trial Court in this regard were in accord with the established doctrine upon the duty of common carriers to passengers, *and with the decision of the jury upon this question we have therefore nothing to do.*"

The evidence relating to the limited issue as to whether it was an operating necessity to have the vestibule door open and the evidence relating to the issue as to whether the vestibule steps or "trap" were open, was legally sufficient to render the determination of both of said issues jury questions and the trial Court could not, without error, have directed a verdict for appellant, based upon the alleged ground that the evidence failed to show that appellant was negligent in any particular alleged with respect to the condition of the vestibule of the car as to "opening".

(d) The evidence of negligence with respect to the condition of the vestibule—as to lights and method of safeguarding—was sufficient.

We have just shown that the evidence of negligence with respect to the condition of the vestibule—as to "opening",—referring to and meaning by such term the open vestibule door and steps or "trap"—was, under the authorities cited and discussed, amply sufficient to warrant the submission of the question of appellant's negligence in that regard to the jury. There remains for consideration the question as to whether the evidence was likewise legally sufficient on the subjects of lights and the method of safeguarding the vestibule. In this connection, so far as the law is concerned, and without repeating them, all of the authorities to which we have heretofore directed the Court's attention and which are to the effect that a carrier of passengers must use the very highest degree of care to keep its vestibules and platforms safe for passage back and forth, apply.

In so far as lights are concerned the evidence shows that there were no warning lights of any kind in the vestibule and that there were no lights therein other than the ordinary dome lights which, at the best, afford none too much light and are never regarded as any notice of danger. Appellee, under the law, had a right to assume that the vestibule was absolutely safe for passage, as it had been at all times before, and if there was lurking therein a hidden danger of which he was

not aware, it was the duty of appellant to so light up and safeguard said danger as to make it readily apparent to its passengers. The fact that appellee did not observe the open steps or "trap" and the open vestibule door was proof sufficient that the vestibule was not adequately lighted and safeguarded, in view of the unknown dangerous condition existing therein.

In *volume 10 Corpus Juris at page 910*, it is said:

> "The carrier owes to the passenger the duty of protection during transportation in order that, while on the carrier's premises and *in its vehicles*, he may enjoy comfort, peace and safety. This duty of care involves warning of danger so far as such warning may enable the passenger to protect himself against an injury which might be anticipated in the exercise of a high degree of care and foresight, and the carrier will be liable for an injury which might have been avoided if due warning had been given."

We print at this point a portion of appellee's testimony:

"*Q.* Now, then, state whether or not you had any notice or warning from anybody that there was an open vestibule on that coach that you were seeking to enter?

A. No, I didn't see anybody there, and I didn't hear anybody. I didn't hear anybody say anything.

Q. Was there any barrier of any kind there?

A. No.

Q. Was there any light of any sort there; any red lantern on the platform floor, to indicate there was danger on that side of the train?

A. No, I didn't notice anything of that kind.

Q. Did you notice anything there except the ordinary lights of the vestibule?

A. Just the ordinary passage between the cars." (Record, pp. 98, 99.)

So far as the Record discloses the rear brakeman, who had opened them, was the only person on the train that knew the vestibule door and steps were open and yet no care or precautions were taken to safeguard the passengers. Said rear brakeman testified that he held in his left hand a white lantern (Record, pp. 274, 275) and that he did not place any lantern or red light on the platform to warn any passenger who might be entering the coach of the open and exposed condition (Record, p. 299) and on cross-examination he admitted that the white light which he had was so held by him as to afford no aid to appellee. His testimony in that regard was as follows:

"*Q.* I mean in the position which you held it. A person coming into the vestibule to go into the next car, would not be likely to see that light, would he?

A. Not be likely to, no.

Q. And you didn't have that light there for the purpose of being any warning to passengers, did you?

A. No, sir.

Q. That was just for your own—

A. That is part of my working equipment.

Q. That is just for your own use?

A. Yes, sir." (Record, pp. 300, 301.)

The expression "method of safeguarding the vestibule" is employed in appellant's motion for a directed verdict but this is a misnomer when applied to the facts of this case. There was not only no particular method of safeguarding used but there was nothing done in that regard. Although an extraordinary condition prevailed nothing out of the ordinary was done to attract attention to it. The situation imperatively demanded additional lights and precautions, especially in view of the facts that no one was assisting the rear brakeman and he had his back turned toward the passage way. His testimony, in that connection, was:

"*Q.* And as you stood there at the back of this coach just ahead of the observation car you were—up to the time you felt somebody touch your arm, you were leaning out, weren't you?

A. Yes, sir.

Q. And you were looking towards the engine?

A. Looking forward, yes.

Q. Along the train?

A. Yes.

Q. So you had your back all during that time to the vestibule?

A. Yes, sir.

Q. And you couldn't see if anybody was in there or not?

A. No, sir.

Q. And there was nobody else there helping you?

A. No, sir." (Record, pp. 304, 305.)

The authorities emphasize the legal duty imposed upon carriers of protecting passengers against unusual dangers, which they, themselves, have *created* and in *volume 10 Corpus Juris, page 910, footnote 1(a)* we find this further statement:

> "It is the duty of a carrier to warn its passengers of dangers that arise from extraordinary or unusual conditions *which have been brought about by the acts of the carrier,* especially where such dangers are not known to the passengers, but are known to the carrier or its agents."

In *Bronson v. Oakes, 76 Fed. 734,* it was said by the Court, at page 740:

> "Whether, having provided vestibuled cars for their passenger trains, it was negligence in the defendants to leave . . . . the outside door of the vestibule open *without a guard rail or other protection* while the train was running rapidly on a dark night, *is a question of fact for the jury to determine.*"

In *Valentine v. Northern Pac. Ry. Co., 126 Pac. (Wash.) 99,* a case cited in appellant's brief, it was said by the Court, at page 102:

> "It would seem that for a much stronger reason should it be held a duty of the carrier to keep its cars so lighted as to enable passengers to avoid danger, since as to these the authorities are practically unanimous that the carrier is charged with the highest degree of care compatible with reasonable operation. When it may be reasonably assumed that the necessities of the passengers might require lights, the failure to furnish them is negligence. Western Maryland R. Co. v. Stanley,

> 61 Md. 266, 48 Am. Rep. 96-98. On the motion for non-suit the appellants were entitled to have their evidence taken as true, and all that it reasonably tended to prove taken as established. They were entitled to every favorable inference reasonably deducible from their evidence. . . . Whether a light in the passageway was reasonably necessary, and whether under all the facts and circumstances, and all the justifiable inferences to be drawn therefrom, Mrs. Valentine would not have been injured but for the lack of light, were questions for the jury."

Under the facts disclosed by the Record and the law relating thereto, there was not such an insufficiency of evidence on the question of lights and method of safeguarding the vestibule as would have warranted the trial Court in directing a verdict for appellant on that ground.

(e) Proximate cause of appellee's injury was a question for the jury.

The last ground of appellant's motion for a directed verdict is "that there was no evidence from which it could be determined that any alleged act of the defendant was the proximate cause of the plaintiff's injury, or of the accident and his resulting injury." (Assignment of Errors, Record, p. 342 and Specifications of Error, appellant's brief, p. 6.)

This ground of appellant's motion for a directed verdict is of no consequence and may with propriety be disregarded if this Court finds, as we confidently believe it will, that there was sufficient evidence of

appellant's negligence to entitle the submission of the case to the jury. It is in the nature of a rhetorical conclusion or culmination to the other grounds of the motion which precede it, for it follows, as a matter of course, that if the evidence was legally sufficient to entitle the submission of the case to jury, that carried with it the question of proximate cause.

It is our belief that the injuries sustained by appellee resulted from a combination of the several acts of negligence charged against appellant in the complaint but, under the authorities, what was the proximate cause of his injuries was a question for the jury.

In *Johnston v. St. Louis & S. F. R. Co., 130 S. W. (Mo.) 413,* no one saw plaintiff's husband fall from the train. There was evidence tending to prove that the vestibule door was open and that deceased in some manner fell through it to the roadside below. It was held that the question of *proximate cause* was a question of fact for the jury. Upon this subject the Court said, at page 416:

> "It is not essential, even to prove that defendant's negligence is the proximate cause of the injury, to produce eye witnesses in every instance. Indeed, facts and circumstances surrounding the situation are sufficient for the purpose, if they fairly suggest the defendant's negligence operated proximately to produce the hurt, and afford a reasonable inference to that effect in accordance with the known experience of men touching matters of like import, so as to indicate the result as a reasonable probability."

As stated by Mr. Justice Strong in *Milwaukee and St. Paul Ry. Co. v. Kellogg, 94 U. S. 469,* "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

We have referred the Court to the evidence and have presented authorities relating to each and every ground of appellant's motion for a directed verdict, contained in appellant's Specifications of Error and respectfully submit that it would have been highly improper for the trial Court to have directed the jury to return a verdict in favor of appellant upon any of the grounds stated in said motion. The decision of every matter and issue referred to in said motion was the rightful province of the jury. And as hereinbefore indicated, appellee was not required under the law to prove that appellant was guilty of negligence in every respect alleged in the complaint and it was legally sufficient that he prove to the satisfaction of the jury, by a preponderance of the evidence, that appellant was negligent in one or more of the respects alleged in the complaint and that such negligence was the proximate cause of his injuries. If he did this, the motion for a directed verdict in favor of appellant could not prevail.

It was not urged as a ground of appellant's motion for a directed verdict that the trial Court should, as

a matter of law, have passed upon the credibility of the witnesses and said that the testimony of the rear brakeman should be accepted as true and the testimony of appellee be disregarded and considered untrue, but this argument or contention is now advanced for the first time in appellant's brief and this Court is being asked to overturn the verdict of the jury and to say, as a matter of law, that the rear brakeman's testimony must be accepted to the exclusion of that of appellee. This contention, not being a part of appellant's motion for a directed verdict, will be referred to later under the title "The Credibility of Witnesses is for the Jury."

We will conclude our argument relating to said motion for a directed verdict with a reference to two decisions that apply to the motion generally, as distinguished from any particular part thereof. It was said by this Court in *Myers v. Brown, 102 Fed. at page 250:*

> "It is urged on the part of the plaintiff in error that each verdict was against the weight of the evidence. The *conclusive* answer to this suggestion is that *upon a writ of error the appellate court does not review controverted questions of fact.* Insurance Co. v. Ward, 140 U. S. 91; Wilson v. Everett, 139 U. S. 616."

In *Richmond & D. R. Co. v. Powers, 149 U. S. 43; 13 Sup. Ct. R. 748,* a decision expressly referred to by this Court and quoted from approvingly in its opinion in *Northern Pac. Ry. Co. v. Adams, 116 Fed. at page*

332, it was said by Mr. Justice Brewer at page 749 of said Sup. Ct. Report:

> "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

THE CREDIBILITY OF WITNESSES IS FOR THE JURY

The contention is advanced for the first time that the testimony of appellant's employee, the rear brakeman, should be accepted as true and the testimony of appellee be rejected as untrue and this Court is asked in appellant's brief to disregard the verdict of the jury and to say, as a matter of law, that the rear brakeman's version of what occurred is true and appellee's version of what happened untrue, on the authority of *Chesapeake & O. Ry. Co. v. Martin, 51 Sup. Ct. R. 453*, a decision founded upon a totally dissimilar situation from that disclosed by the Record in the instant case.

The action brought in said *Chesapeake O. Ry. Co.* case was one to recover damages for the misdelivery of a carload of potatoes and it was not an action where there were involved many or any complicated issues of fact. The testimony of the witness in said case which the Court held should have been found to be true

related to one matter only, namely: What was the time reasonably necessary for completion of the delivery of the potatoes. The law declared in any given case must, in thereafter applying it to other cases, be carefully considered and scrutinized with respect to the facts of the particular case out of which it emanates. What is good law in one case may be very bad law if applied to another case, totally dissimilar in point of fact, and that is the situation here.

A reading of the language shown at page 456 of the opinion of the Court in said *Chesapeake & O. Ry. Co.* case shows it there stated that the witness' testimony which was disregarded was "wholly unchallenged by other evidence or circumstances"; that not only was the testimony of said witness "not shaken by cross-examination" but, indeed, that "there was no cross-examination" of said witness at all. It is further said by the Court at said page that the accuracy of the testimony of said witness "was not controverted by proof or circumstance, directly or inferentially", and, further, that said "witness was not impeached" and finally that "the only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner". How different is the situation disclosed by the Record in this case.

The testimony given by the rear brakeman was most unreasonable and improbable. It was his version of what transpired, as we have already heretofore mentioned, that while he was standing on the rear platform

of the coach from which appellee was thrown and had both arms extended and was, so appellent claims, to a great extent blocking the opening in the platform, appellee walked up to him and lightly touched him on the arm as though to attract said rear brakeman's attention and then for no apparent reason whatsoever appellee walked or stepped out into darkness and landed on the right-of-way. It was certainly for the jury to say whether this most remarkable story was true.

He admitted that he said nothing to appellee at said time and says, in effect, that although he grabbed for appellee he missed him. If appellee was not thrown by the lurch of the train and was not falling, why was he grabbing for him? And if he did grab for him, why was he not able to prevent appellee from leaving the train, if as he says appellee was at that time merely walking? These were all questions for the jury.

Unlike said *Chesapeake & O. Ry. Co.* case, the testimony of said rear brakeman was flatly contradicted by the testimony not only of appellee but other witnesses. It is suggested in appellant's brief at page 42 that the rebuttal testimony of appellee was not a sufficient contradiction of said rear brakeman's testimony, but there is no merit in this contention. It was perhaps not necessary to have called appellee in rebuttal at all because he had theretofore testified fully as to how he contends the accident occurred.

Both versions cannot be true and the acceptance

of one is the denial of the other and this Court will observe by examining the Record at pages 327 and 328 that what was asked of appellee on rebuttal was first objected to by appellant's counsel. At said pages the following appears: "*Q.* I will ask you to state what the fact is as to whether you walked or stepped from the train? *Mr. Rockwood:* I object to that as improper rebuttal. *Court:* You covered that on direct examination. *Mr. Dibble:* Was it covered the other time? *Court:* I think you did."

Said rear brakeman admitted that in announcing that an accident had occurred he said that a Sir Knight had fallen off (Record, p. 313) and the Record further discloses that to no witness called by either side did the rear brakeman say that appellee had walked or stepped from the train. The testimony of appellant's witness, Sawyer, on this subject may be found at Record, pp. 218-219, and that of appellant's witness, Bennett, at Record, pp. 241-242.

Unlike the situation in said *Chesapeake & O. Ry. Co.* case, said rear brakeman was impeached. The foundation for his impeachment by appellee's witness, Cornell, was laid (Record, pp. 313, 314) and said rear brakeman was impeached by said witness, Cornell, (Record, pp. 325-326). The foundation for the impeachment of said rear brakeman by appellee's witness, Stuart, was laid (Record, pp. 314, 315) and said rear brakeman was impeached by said witness, Stuart, (Record, pp. 326-327). The substance of said impeachment was that

said rear brakeman stated to both of appellee's said witnesses that appellee *fell* through the vestibule and *struck* his (said rear brakeman's) arm and that he reached to grab appellee but could not catch or save him.

We submit that the situation disclosed by the Record in this case is so totally dissimilar as to make the law declared in said *Chesapeake & O. Ry. Co.* case inapplicable and will conclude our argument on this point with the following quotation to be found in the decision of this Court in *Southern Pac. Co. v. Hanlon, 9 Fed. (2d) 294, at page 296:*

> "It must be remembered that the witness by whom it was sought to prove the justification or excuse was the negligent party, if there was any negligence, and he was also an interested party to the extent, at least, that he might jeopardize his position with the company if he stopped a passenger train in this manner without any excuse or justification therefor. Under such circumstances we think the question of his credibility and the weight of his testimony was for the jury alone.

"In *Quock Ting v. United States, 140 U.S. 417, 420, 11 S. Ct. 733, 734, 851 (35 L. Ed. 501)*, the Court said:

> 'Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the Court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be

contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.'

"In *Elwood v. Telegraph Co., 45 N. Y. 549, 553* (*6 Am. Rep. 140*), the Court said:

'It is undoubtedly the general rule that, where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. . . . But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility, . . . and furthermore it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances, as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached.' For these reasons, we are of opinion that the questions of fact were properly left to the jury, and the judgment is affirmed."

SPECIFICATIONS OF ERROR NUMBERED 2, 3, 4 AND 5 PRESENT NOTHING FOR REVIEW

By specifications of error numbered 2, 3, 4 and 5 (pp. 6 and 7, appellant's brief) appellant asks this Court to reverse the trial Court for failing to give certain requested instructions to the jury. These specifications of error are not for consideration in this Court for the reason that appellant did not except to the failure to give said requested instructions, prior to the retirement of the jury to deliberate upon the case.

Rule 10 of the United States Circuit Court of Appeals for the Ninth Circuit provides, among other things, as follows: "The party excepting shall be required *before the jury retires* to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the Court or inserted in the Bill of Exceptions."

The rule is referred to at *page 21 of O'Brien's Manual of Federal Appellate Procedure*, in the following language: "The proper manner of reserving exceptions is a part of the procedure in error in Federal courts of review, and is not controlled by the conformity provision of the Revised Statutes. It is necessary, therefore, for counsel to specifically state the grounds of objections to the instructions given, and to reserve proper exceptions *before the jury retires to deliberate;* it is not proper for the trial judge to permit counsel to take exceptions to the charge after the jury has retired."

It affirmatively appears from the record that no exceptions were taken by appellant to the failure to give said requested instructions *until after the jury had retired to deliberate upon the case.*

As shown at pages 27–28, Record, the original Bill of Exceptions recited that the Court refused to give said requested instructions and that appellant excepted to the refusal to give the same. This would imply that appellant excepted in the time and manner provided and required by law and in conformity with said rule. But such was not the case and, therefore, appellee objected to appellant's proposed Bill of Exceptions and asked that the same be amended and that there be inserted therein a recital of what actually occurred with respect to said requested instructions and the failure to give the same.

As shown at pages 30–31, Record, and at pages 338–340 thereof, it was finally certified by the Court that the following is a true recital of what occurred upon the trial with respect to the alleged failure of the Court to give said requested instructions to the jury:

"*After the jury left the jury box and had retired,* the following colloquy ensued between counsel for defendant and the trial court and the following proceedings occurred, to-wit:

Mr. Rockwood: May we have an exception, if your Honor please, to the refusal of the Court to give requested instructions 1–2–3–4 and 4-a?

Court: That is the motion for a directed verdict?

Mr. Rockwood: Specific request to take away certain issues from the jury.

Court: You can have your exception, *but I might advise you that it will be unavailing because the Circuit Court of Appeals has repeatedly held that exception must be taken before the jury retires.*"

Under the circumstances disclosed by the record, said specifications of error present nothing for review by this Court. The purpose of the said rule is manifest and compliance with it is in furtherance of justice and the orderly conduct of jury trials. Its due observance apprises the trial Court that it is seriously contended that a certain instruction should be given to the jury, thus enabling the trial Court to look into the matter and determine, before the jury retires to deliberate, whether such an instruction should be given. To sit idly by and not take exceptions or make objection, while the jury is present and there is yet time to correct any possible error or omission, leaves the trial Court to believe that it is not insisted that any error has been committed in the instructions to the jury. It is not fair to the trial Court or the adverse litigant to defer the making of objections to or the taking of exceptions to the charge of the Court until such time as it is too late to correct a possible oversight.

The Circuit Court of Appeals for this, the Ninth Circuit, has uniformly held that exceptions to the charge, not taken prior to the retirement of the jury,

present nothing for review and no reason exists why this well-established and well-known rule of practice should be departed from. In *Fasulo v. United States, 7 Fed. (2d) 961,* this Court said at page 962:

> "The same general rule must apply to the procedure in relation to taking of exceptions *to the refusal to give instructions requested.* Exceptions must be taken after the charge and while the jury is at the bar."

The following is quoted from pages 851–2 of the opinion of this Court in *Miller & Lux, Inc. v. Petrocelli, 236 Fed. 846:*

> "We, therefore, think there is no merit in the contention that the Court below erred in admitting in evidence the testimony in respect to such warning, and still less in the contentions of the plaintiff in error in respect to the other rulings on the trial, save only those regarding the instructions to the jury, given and refused, *as to which the plaintiff in error is concluded by its failure to take any exceptions thereto prior to the retirement of the jury* for the consideration of the case and the return of its verdict. *It is too late now to question the well-established rule in this circuit that such exceptions must be taken prior to such time,* which rule is in accordance with and founded upon the decision of the Supreme Court. See Phelps v. Mayer, 15 How. 161, 14 L. Ed. 643; Western Union Tel. Co. v. Baker, 85 Fed. 690; Star Co. v. Madden, 188 Fed. 910; Mountain Copper Co. v. Van Buren, 133 Fed. 1; Arizona, etc., Ry. Co. v. Clark, 207 Fed. 817; Copper River, etc., Ry. Co. v. Heney, 211 Fed. 459; Beatson Copper Co. v. Pedrin, 217 Fed. 43 and Alverson v. Oregon-Washington Railroad & Navigation Co., 236 Fed. 331, decided by this Court September 5, 1916."

The decision of this Court in *New York Life Ins. Co. v. Slocomb, 284 Fed. 810,* is peculiarly pertinent. There, as here, the trial was presided over by the late Judge Robert S. Bean, who advised counsel, just as he did in the instant case, that the exceptions taken to the charge and to the refusal to give certain requested instructions would be unavailing because the exceptions were not taken before the jury retired. The case is exactly parallel with the situation presented by the record in the case at bar.

In holding that the assignments of error predicated on said exceptions could not be considered and in declining to review the same on the appeal, this Court, speaking through Mr. Circuit Judge Hunt, said at page 811:

> "The company complains that the Court erred in the giving of certain instructions to the jury and in refusing to give certain instructions requested, but as no exceptions of any kind were taken with relation to the charge or to the refusal to charge before the jury retired, and though the Court advised counsel that it did not know that the exceptions interposed after the jury retired would be of any service to their client, and called attention to the necessity for excepting to the charge before the jury retired, counsel took no steps to comply with the suggestions of the Court. Under the circumstances the assignments with respect to the giving and refusing to give instructions are not for consideration here. Alverson v. O.-W. R. & N. Co., 236 Fed. 331; Miller & Lux, Inc. v. Petrocelli, 236 Fed. 846; Central R. Co. v. Sharkey, 259 Fed. 144."

In view of said well established rule of this Court and the decisions of this Court based thereon, from which we have no reason to believe this Court will now depart, none of the said Specifications of Error relating to the alleged failure of the trial Court to give said written requested instructions to the jury are reviewable. Said requests were all peremptory requests asking the Court to withdraw certain issues of negligence from the consideration of the jury, and in our argument against appellant's motion for a directed verdict we have shown that there was sufficient evidence of negligence on the part of appellant with respect to each and every issue of negligence referred to in said requests.

There was, as has already been shown, sufficient evidence to go to the jury upon the question of excessive speed and upon the question of the lurch of the train and upon the dangerous condition of the vestibule, including the steps or "trap" thereof, so that the failure to give any of said requested instructions was not error and, as above stated and shown, the failure of the trial Court to give said requested instructions presents nothing for review or consideration by this Court inasmuch as the rule of this Court was not complied with, requiring exceptions to the Court's instructions to be taken before the jury retires and while there is yet opportunity to correct any oversight or mistake.

SPECIFICATION OF ERRORS NUMBERED 6 —ABANDONED

Although in its Specifications of Error, appellant in specification 6 (page 7, appellant's brief) assigns as an alleged error the denial of its motion for a new trial, based upon the alleged ground, among other things, that the damages awarded by the jury's verdict are excessive and appear to have been given under the influence of passion and prejudice, we assume from the concluding statement of appellant's brief, page 51, that said specification of error is abandoned and is not to be urged or considered further. After expressing regret at the untimely death of the Honorable Robert S. Bean, the Judge who presided at the trial, it is stated in appellant's brief that "For this reason we shall not urge here the specification of error based upon the excessive award made by the jury."

We are at a loss to understand why this specification of error was made and the subject matter thereof discussed in appellant's brief, if its counsel are sincere in their said statement that said specification of error will not be urged and we are, under the circumstances, forced to conclude that appellant is seeking thereby to enlist unwarranted and undeserved sympathy and to try to have it appear that the unfortunate passing of Judge Bean operated to appellant's disadvantage, as distinguished from that of appellee. Appellee and his counsel deplore with equal regret the death of the

beloved trial Judge. By his passing the bench and bar are deprived of an unusually able and conscientious Judge. Every presumption and every intendment is in favor of the verdict and of the judgment entered thereon and appellee and his counsel have every right to believe that had Judge Bean lived to pass upon the matter he would have refused to disturb the verdict.

Such a ruling by him would have been entirely consistent with the trial Judge's instructions to the jury on the subject of damages and the measure thereof, to which, it is to be noted, no objection was made or exception taken by appellant. See Record, pages 335–336, where the trial Judge, among other things, said:

> "If the matter involved in this case was property which had a market value we could arrive at some reasonable estimate of the recovery, but when it comes to fixing compensation for injury to a human being *there is no fixed rule of law.* The object to be attained is, of course, just and fair compensation, *but the amount thereof must, after all, be left to the good judgment and sound discretion of the jury.*"

Such a ruling would, also, have been entirely consistent with the trial Judge's disposition of other cases heard before him. He insisted that jurors take the law from the Court but he religiously respected the jury's findings on purely questions of fact. One of the later cases tried before him, in which he refused to interfere with or disturb the jury's verdict on the *quantum* of damages and which was appealed to this Court, is *Bowman-Hicks Lumber Co. v. Robinson, 16*

Fed. (2d) 240. In affirming plaintiff's judgment in that case this Court said at page 242:

> ". . . We are not convinced that the verdict is so grossly excessive as to bring the case within the narrow compass within which an appellate court may review and revise the discretion of the trial court. There are no other circumstances suggestive of passion or mistake. Out of numerous cases the following may be cited as fairly representative: Wulfrohn v. Russo-Asiatic Bank, 11 Fed. (2d) 715; Detroit U. Ry. Co. v. Craven, 13 Fed. (2d) 352; Robinson v. Van Hooser, 196 Fed. 620; Pugh v. Bluff City Exc. Co., 177 Fed. 399; New York R. R. Co. v. Fialoff, 100 U. S. 24; Wilson v. Everett, 139 U. S. 616; New York, etc., R. Co. v. Winter, 143 U. S. 60; Lincoln v. Power, 151 U. S. 436." This case was carried to the Supreme Court of the United States, where a petition for a writ of certiorari was denied. (See 274 U. S. 736; 47 Sup. Ct. Rep. 574.)

In *Cain v. Alpha S. S. Corporation, 25 Fed. (2d) 717*, it was said by the Court at page 723:

> "The claim that the verdict is excessive was presented to the District Court upon a motion for a new trial. There was no abuse of discretion in denying that motion. The amount of the verdict is not for us to review", citing authorities, including said case of Bowman-Hicks Lumber Co. v. Robinson, 16 Fed. (2d) 240.

The fact that appellant's motion for a new trial was passed upon by a Judge, other than the one who presided at the trial, makes no legal difference and does not take the case out from the purview and rulings made by this and other Federal Courts in the cases

just cited and quoted from by us. *Section 28–776 United States Code Annotated*, pursuant to which the Honorable John H. McNary, Judge, acted in hearing and passing on said motion, expressly provides: "and his ruling upon such motion . . . . . shall be as valid as if such ruling . . . . had been made by the Judge before whom such cause was tried."

Although under another express provision of said statute, Judge McNary could, in his discretion, have granted a new trial, had he felt that he could not fairly pass upon the motion, he did not have any such feeling or take any such view of the case. He had the benefit of the entire transcript of the evidence and of all the proceedings had upon the trial, as well as exhaustive briefs, submitted by both sides. The motion was also orally argued before him and taken under advisement for study and reflection. No good legal or other reason exists why his ruling should be disturbed.

But for the rather adroit and clever manner in which, although expressly waiving and abandoning said specification of error, counsel for appellant press it on the attention of the Court, we would not have pursued the matter to the length we have, but, out of an abundance of precaution, we have done so. In the brief submitted by appellee to the District Court, in opposition to appellant's motion for a new trial, we commented upon and summarized and directed attention to the evidence, showing the permanency

of appellee's injuries and the damages sustained by him but we will not, in this brief, do so or further trespass upon the time of this Court. Relying upon said statement in appellant's brief, we will assume that said alleged specification of error 6 is not urged and has been expressly waived.

APPELLANT'S AUTHORITIES—DISCUSSED

We have read every case listed in the Table of Cases contained in appellant's brief and, taking them up in the alphabetical order in which they there appear, we will indicate, briefly, our views concerning them. We pass, without special comment, *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248; *Improvement Company v. Munson, 14 Wallace 442*, and *Larabee Flour Mills Co. v. Carignano, 49 Fed. (2d) 151*, all cited at page 13, appellant's brief, as sustaining the proposition that a mere scintilla of evidence is insufficient to support a verdict.

The expression "scintilla of evidence", when employed in this connection, denotes and means a "spark" or a "speck" or the "least particle" of evidence and relates to evidence that may, without hesitation, be fairly characterized as "trifling". The Record in the case at bar presents evidence tending to show such flagrant violations by appellant of the duties and of the extremely high degree of care owing from a carrier to its passengers and such disregard for appellee's

rights and safety that we are confident this Court will find no occasion to apply the doctrine announced in said three cases but will, on the contrary, feel that what was said by this Court in *Eastern & Western Lumber Co. v. Rayley, 157 Fed. 532,* is more appropriate. It was there said by Judge Ross, at page 533:

> ". . . . . We do not sit to determine the weight of conflicting evidence. That is the sole province of the jury in cases tried with a jury."

Having heretofore made special reference to and commented upon the case of *Chesapeake & Ohio Ry. Co. v. Martin, 51 Sup. Ct. R. 453,* cited and quoted from at pages 13, 28, 29 and 42, appellant's brief, said case will not be further noticed or commented upon in the ensuing review of appellant's authorities.

Amyot v. D. S. & S. Ry. Co., 214 N. W. (Mich.) 140, cited at page 43, appellant's brief, is so dissimilar in its facts as not to be applicable. In that case it appeared, without dispute, that the vestibule door had to be opened to disconnect the cars and because the vestibule doors had to remain open while the train was being transported on a ferry. The following quotation from page 140 is in complete harmony with appellee's position:

> "Generally, the purpose of vestibules is that those on board the train may safely pass from one car to another. The carrier having provided vestibule coaches is bound to make them safe for travel. A passenger may assume that they are safe and that they will be prudently managed."

Delaney v. Buffalo R. & P. Ry. Co., 109 Atl. (Penn.) 605, cited at pages 18 and 23, appellant's brief, insofar as it holds that no presumption of negligence arose from the happening of the accident, is contrary to the weight of authority and not in harmony with the rule announced by this Court in *Southern Pac. Co. v. Hanlon, 9 Fed. (2d) 294.*

The same may be said of *Denver & Rio Grande R. Co. v. Fotheringham, 68 Pac. (Colo.) 978*, cited at page 21, appellant's brief. It should be noted, also, that in *French v. Pacific Electric Ry. Co., 82 Pac. (Cal.) 394*, the Supreme Court of California made mention of said Denver & Rio Grande case and expressly declined to follow it. Two of the cases cited by the late Judge Rudkin in support of the rule of law announced by this Court in *Southern Pac. Co. v. Hanlon, supra*, are California decisions, showing that this Court follows California and not Colorado insofar as there exists any divergence in the authorities.

A careful reading of *Elliott v. Chicago, etc. Ry. Co. et al, 236 S. W. (Mo.) 17*, cited at page 21, appellant's brief, shows that, although plaintiff's judgment was reversed, it was not due to any insufficiency in her case. The action was brought against two defendant's, namely, the railway company and the Director General of Railroads. It was held that plaintiff's cause of action was not against the railway company but against said Director General, necessitating a reversal. The fol-

lowing language, quoted from page 20, is favorable to appellee:

> "In this case, the 'sudden, violent, and unusual movement and jerking of the train or car' is the unusual and extraordinary thing which plaintiff claims happened and caused her injury during her transportation. *If there was such an occurrence,* then the presumption of defective appliances or *negligent operation* arises; otherwise, there is no evidence whatever of negligence on the part of defendants."

It was further said at pages 20–21:

> "Plaintiff testified to two specific physical facts that cannot be disposed of so easily, namely, that the jolt and jar 'threw' her against the side of the seat and 'threw' her grip from the seat to the floor."

In citing at pages 20 and 21 of its brief *Foley v. B. & M. R. R. Co., 79 N. E. (Mass.) 765,* appellant furnishes the L. R. A. reference. The note to said case, shown at page 1076, 7 L. R. A. (N. S.), makes no comment on the ruling made in said Foley case but gives a long list of cases holding that, in instances where "violent" and "unusual" and "extraordinary" jerks or lurches are shown, the doctrine of *res ipsa loquitur* applies. The decision in the Foley case seems to unduly discount the powers of observation and the credibility of the average witness. We do not believe that any of the splendid witnesses, who testified in corroboration of appellee, were afflicted with "nervous emotion"; "exuberance of diction" or "volatility of imagination".

In *Gayle's Adm. v. L. & N. R. Co., 173 S. W. (Ky.)*

1113, cited at page 43, appellant's brief, the Court properly assumed, as shown at page 1114, "that the evidence as to the character of the jerk was sufficient to take the case to the jury".

Gulf, etc. Ry. Co. v. Wells, 275 U. S. 455, cited at page 16, appellant's brief, is not a passenger case but is one involving an injury to a brakeman, attempting to board a moving freight train. The case was controlled by the Federal Employer's Liability Act and the first ground for the ruling therein made was that there was no evidence that the engineer knew plaintiff was on the train or in a position of danger.

In *Gunning v. Cooley, 281 U. S. 90*, cited at page 13, appellant's brief, it was said at page 233 of the report of said case in 50 Sup. Ct. Rep. that "issues that depend on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury".

The ruling of the Court in *Hoskins v. Northern Pacific Ry. Co., 102 Pac. (Mont.) 988*, cited at page 47, appellant's brief, was grounded, primarily, on the fact that plaintiff, a railway mail clerk, failed to prove that he was a passenger. As stated by the Court at page 990, "as the plaintiff elected to rest his case without offering any testimony as to the cause of the derailment, the burden was upon him to prove that he was a passenger." And this, the Court held, plaintiff failed to do.

Nelson v. Lehigh Valley Ry. Co., 50 N. Y. S. 63, cited at page 23, appellant's brief, is not in harmony with the

prevailing weight of judicial opinion and runs contra to the rule announced by this Court in *Southern Pacific Co. v. Hanlon, 9 Fed. (2d) 294.*

Norfolk & Western Ry. Co. v. Rhodes, 63 S. E. (Va.) 445, cited at page 20, appellant's brief, is inconsistent and illogical. In that case, plaintiff, while holding to a door of the train, was thrown by a violent and unusual and extraordinary lurch. After expressly stating at page 446 that the *res ipsa loquitur doctrine* applied and that from the circumstances narrated by the plaintiff a *prima facie* case of negligence was made out, the Court, nevertheless, invading the province of the jury, proceeded to hold that no negligence had been shown.

Norfolk & Western Ry. Co. v. Birchett, 252 Fed. 512, cited at pages 16 and 22, appellant's brief, is one of the earlier Federal cases in which, because of the meager showing made in behalf of plaintiff, the Court felt constrained to hold, as a matter of law, that no evidence of negligence had been shown. An examination of Shepard's Citations, to date, does not show the case to have been cited as authority or commented upon by any Court. In so far as said case announces any principle of law inconsistent with or contrary to this Court's decision in *Southern Pacific Co. v. Hanlon, 9 Fed. (2d) 294,* it is not to be regarded as authority in this—the Ninth Circuit.

Smith v. Chicago, etc. Ry., 193 N. W. (Wis.) 64, cited, in a discussion of the matter of speed, at page 47,

appellant's brief, is a case so essentially different in its facts as not to be applicable here. In that case a public highway paralleled defendant's track and it was held that the railway company was not bound to anticipate that two vehicles would collide on the highway and one be thrown on to the railway right of way and that, there being no speed limit imposed on the railway, by either statute or ordinance, no negligence as to the speed of the train was shown. In the case at bar an entirely different situation was presented. The testimony of appellant's own employes was to the effect that a "slow order", imposed by appellant, itself, prevailed at the place on appellant's right of way, where appellee was thrown from the train, and there was evidence, given on cross-examination by appellant's train crew, tending to show that said "slow order" was being grossly violated.

Southern Pacific Co. v. Hanlon, 9 Fed. (2d) 294, cited —or rather referred to— at pages 21 and 22, appellant's brief, is one of the more recent Federal decisions and is a case in which the able opinion of this Court was written by the late Judge Rudkin. It is only scantly noticed in appellant's brief and such reference as is therein made to it is in connection with a vain attempt, on the part of appellant, to distinguish it. The case is so squarely in point and so in harmony with the weight of modern judicial utterance on the legal principles discussed and decided therein, that we will, before referring further to appellant's attempted dis-

tinction of said case, make more prominent allusion to it.

In said case the plaintiff, who prevailed in the lower Court, was a passenger on a train running from Portland, Oregon, to Chico, California, and the only question presented for consideration on the railway company's appeal to this Court was the sufficiency of plaintiff's testimony to warrant the submission of the case to the jury. It appeared from plaintiff's testimony that soon after the train left Glendale, and while it was traveling at a speed of thirty or forty miles per hour, it was brought to a sudden stop by an application of the emergency brakes and that the sudden stopping and jerking of the train threw the plaintiff to the floor of the observation car.

The defendant admitted the sudden stopping but sought to avoid liability by the affirmative defense that the train was so stopped to save the life of a trespasser, whom, it was claimed by defendant, had missed his footing in attempting to board the train. Speaking for this Court, Judge Rudkin said at page 295:

> "The testimony on the part of the defendant in error," (plaintiff below) "brought the case clearly within the rule: 'When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' Atlas Powder Co. v.

Benson, 287 Fed. 797. See, also, Renfro v. Fresno City Ry. Co., 84 Pac. (Cal.) 357; Babcock v. Los Angeles Traction Co., 90 Pac. (Cal.) 780; Consolidated Traction Co. v. Thalheimer, 37 Atl. (N. J.) 132; Scott v. Bergen County Traction Co., 43 Atl. (N. J.) 1060; Paul v. Salt Lake City R. Co., 83 Pac. (Utah) 563); Fitch v. Mason City & C. L. Traction Co., 100 N. W. (Iowa) 618."

Realizing that the decision of this Court in said case of Southern Pacific Co. v. Hanlon is controlling on this appeal, counsel for appellant, after first incorrectly stating, at pages 21 and 22 of their brief, that it "is in entire harmony with the cases discussed" by them, offer this lame and futile distinction as a legal reason for the holding by this Court that the doctrine or rule, *res ipsa loquitur*, applied: they say the reason this Court so declared the law was because it appeared without contradiction that the train was suddenly stopped.

According to the argument advanced by appellant's counsel, the invoking of said doctrine or rule and its applicability to a given case depends upon whether it appears, without dispute, that the occurrence, or offending act complained of, happened. If, they say, the defendant is gracious enough to admit the offending act charged, the doctrine or rule, *res ipsa loquitur* applies, otherwise not. This is a novel and startling contention, without support or precedent in the many adjudicated cases involving or treating the subject of the applicability of the doctrine or rule, *res ipsa loquitur*,

and such contention, if upheld, would introduce a new and heretofore unheard of element.

We have examined all seven of the cases, cited by Judge Rudkin in said case of Southern Pacific Co. v. Hanlon, as supporting the holding of this Court therein: that the doctrine or rule, *res ipsa loquitur*, applied, and in not a single one of said cases did the defendant admit the doing of the particular offending act charged or did it appear, without dispute or contradiction, that the thing or occurrence complained of by plaintiff, happened. This, of itself, should be a sufficient answer to appellant's contention and shows the same to be without legal merit.

Tudor v. Northern Pacific Ry. Co., 124 Pac. (Mont.) 276, cited at page 43, appellant's brief, is so dissimilar in point of fact as not to be applicable upon the question of appellant's negligence in leaving the vestibule door open. In that case it appeared, without dispute, that the plaintiff, himself, requested the conductor to open the vestibule door. He knew the door was open and intended to pass through it in getting off at his station. It was naturally held that plaintiff could not blame the railway for opening a door which he, himself, asked the conductor to open.

Union Pacific R. Co. v. Brown, 84 Pac. (Kan.) 1026, cited at page 43, appellant's brief, is quite similar to the Tudor case, just commented upon, in that the vestibule door had been opened on the station side for the purpose of permitting plaintiff's husband to alight.

There was no evidence of any extraordinary lurch of the train and the Court merely held that it was not negligent to have the vestibule door open on the station side, for the purpose of discharging passengers. In the case at bar the vestibule door was not open for the purpose of discharging passengers and should have been closed, as the train was in rapid motion between stations.

Valentine v. Northern Pacific Ry. Co., 126 Pac. (Wash.) 99, cited at page 19, appellant's brief, is distinguishable in that there was no pleading to sustain the contention that the lurching of the train resulted from negligent operation. With respect to that contention the Court said at page 102:

> "The complaint was amended in its allegations of negligence after the evidence was in. *It contains no charge of negligent operation,* or that the roadbed was faulty or defective."

Speaking of the degree of care owing from the defendant, railway company, to the plaintiff, its passenger, the Court said at page 101:

> "As to the respondent, Northern Pacific Railway Company, the case presents a different aspect. It operated the train as a common carrier. As such it was incumbent upon it to exercise the highest degree of care, prudence, and foresight for the safety of its passengers compatible with the practical performance of the duty of transportation. *It would be liable for the slightest negligence with reference to the exercise of such care.* This is law so familiar and has been announced so often

in various forms of expression as to require little citation of authority."

Wile v. Northern Pacific Ry. Co., 129 Pac. (Wash.) 889, cited at pages 19 and 20, appellant's brief, is not in point as it involved injury to a passenger, riding on a *mixed* train, consisting of thirty freight cars and only one passenger car. In the case at bar, the train was a strictly passenger train, throughout. In its opinion in said case the Court said, at page 890:

> " 'Passengers on freight trains assume those dangers or perils which are necessarily incident to that mode of conveyance . . . . A passenger on a freight train is charged with knowledge of and assumes the *increased* hazards incident to that mode of travel, and he accepts passage with notice that the train is not equipped with all the safeguards provided for passenger trains, and the risk of injury due to this fact. . . . . The duty of the company is, therefore, modified by the necessary difference between freight and passenger trains and the manner in which they must be operated.' "

APPELLANT'S JURY ARGUMENTS —ANSWERED

Under the above Title we had intended to answer the many jury arguments contained in appellant's brief, some of which are old, in the sense that they were made upon the trial, and some new, in that they are presented for the first time in appellant's brief, but time and space will permit reference to but two of these.

Considerable reference is made in appellant's brief to the fact that at the commencement of the trial and prior to the opening statements, application was made in open Court and in the presence of the jury, and under the circumstances shown at Record, pp. 33-35, to amend the complaint. It was argued upon the trial and is urged again on this appeal that the amendment asked for and allowed changed the allegations of negligence with respect to the negligent operation of the train but an examination of the Record at the first page last mentioned will show that the amendment referred to the *place* where the alleged negligent operation of the train occurred rather than to the *charge* of negligence.

In both the original complaint and the complaint as amended it was alleged that appellant was careless and negligent in that it so operated the train as to cause it to sway and to give an unusual and extraordinary and violent lurch. Learning from the interviewing of appellee's witnesses, in anticipation of the trial, that the complaint as originally drawn was not accurate with respect to the place on the track where the negligent operation occurred, we thought it fair to correct the matter before proceeding further with the trial.

Although an exception was taken by appellant to the ruling of the trial Court in permitting the amendment, no error is assigned on account thereof and any argument based on the fact that the complaint was so amended was and is a jury argument, pure and simple,

presenting no legal point for determination by this Court.

It was argued to the jury and is again argued in appellant's brief that appellee was carefully questioned by the examining physician of appellant and gave a different statement as to how the accident occurred from that testified to by him. The cross-examination of said physician shows that he did not undertake, as a lawyer or claim agent might, to pin appellee down as to the precise facts of how the accident happened, but that, as a preliminary to his medical examination and for the purpose of qualifying himself to testify as an expert witness for appellant, he took such a general history of the case as a physician ordinarily does.

Under such circumstances, appellee would not be asked the minute details as to how he was injured. That the questioning of appellee by said physician could not have been very full or complete is shown by the fact that said physician testified on cross-examination that he did not even learn from appellee that the latter had been thrown from the train. (Record, pp. 186, 187.) This, like the matter just referred to, presents again a jury argument, namely: an argument designed to detract from the credibility of appellee's testimony.

Such argument is fully answered by the language of the Court in *Sanson v. Philadelphia Rapid Transit Co., 86 Atl. (Pa.) 1069.* In that case it was contended, much as counsel seek to contend in the instant case,

that the "deponent" was unworthy of belief because it was said that he signed a statement for an agent of the railway company containing contradictory statements with that of his deposition but the Court held that the credibility of the witness was for the jury. The following is quoted from page 1070 of the opinion in said case:

> "This contention, as we understand it, would require the Court to hold as a matter of law that the witness was unworthy of belief. *We are not familiar with any case that has gone that far.* The matters complained of affect the credibility of the witness, *but surely it is the province of the jury to pass upon this question.*"

CONCLUSION

Appellant concludes its brief with the statement that the judgment appealed from imposes a liability upon appellant "for an accident which appellant could not possibly have prevented." We feel, as the jury has found, that such statement is unwarranted and unjustified. The Record discloses glaring negligence on the part of appellant. Had it exercised any where near the degree of care and precaution that the law imposes on a common carrier of passengers, appellee would not have been thrown out of the vestibule of the train and caused to suffer the grievous and permanent injuries that have come to him, through no fault of his.

The question of appellee's negligence was submitted to the jury as the first question to be decided by it, and

by its verdict the jury has absolved appellee of any blame for the misfortune that has come to him. But one legal question is presented by this appeal, namely: Did the trial Court err in refusing to direct a verdict in favor of appellant? The authorities and Record demonstrate, beyond all question, that it would have been erroneous to have directed a verdict in favor of appellant.

The verdict of the jury was the product of *law*, rightly declared by one of the ablest trial Judges who has ever graced the Federal bench, and of *facts*, most carefully and earnestly and conscientiously inquired into and found by a jury of high type, drawn from the various walks of life. By the unanimous verdict of such a jury, after a most careful and painstaking trial, it has been adjudged that the lasting injuries which have come to appellee during the later years of an industrious and honorable life were caused by the negligence of appellant. No error appearing, the judgment should be affirmed.

Respectfully submitted,

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